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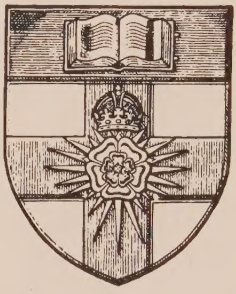

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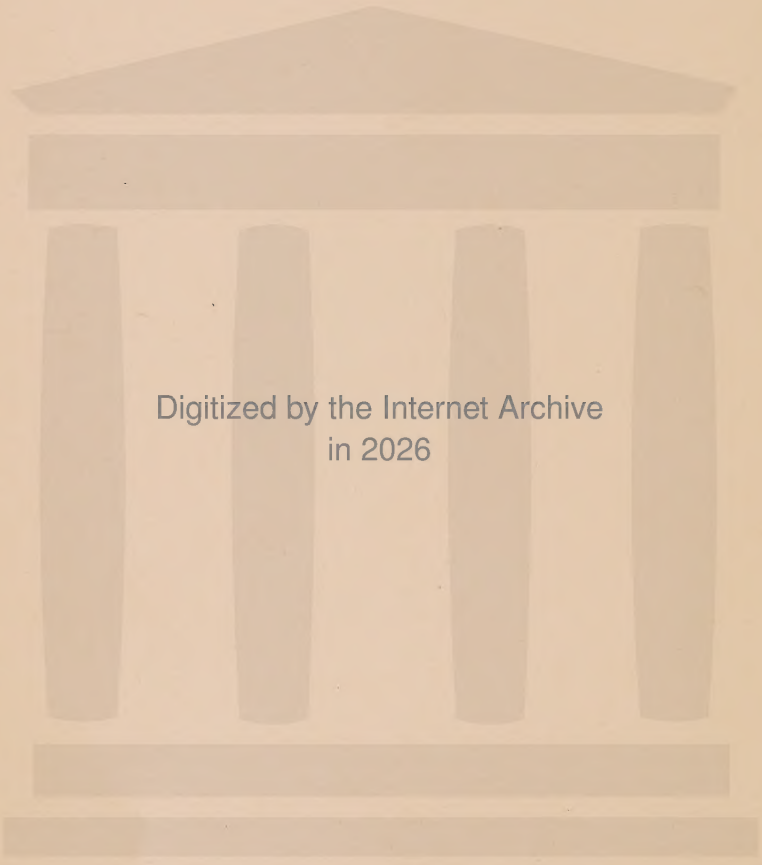

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1959

Probate, Divorce, and Admiralty Division

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Matrimonial Causes (Judgment Summons) Rules, 1952 (*S.I.* 1952, *No.* 2209) (*L.* 21), *r.* 6 (3) - **Collingwood J. 1**

CASES

DETERMINED BY THE

PROBATE DIVORCE & ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS

O'MAHONEY *v.* O'MAHONEY.

1958
Oct. 20;
Nov. 24.

Collingwood J.

Husband and Wife—Maintenance—High Court—Committal order—Whether order pending suit and subsequent maintenance order one "judgment"—Matrimonial Causes (Judgment Summons) Rules, 1952 (*S.I.* 1952, *No.* 2209) (*L.* 21), *r.* 6 (3).

In November, 1957, a committal order was made, suspended upon the payment, in addition to sums due under an order for alimony pending suit for a wife and maintenance pending suit of two children, of further weekly sums in discharge of arrears. In March, 1958, a decree in favour of the wife having been made absolute in January, 1958, an order for maintenance was made in favour of the wife and children as from decree absolute. In September, 1958, an application was made for leave to issue the suspended committal order. At that date the husband was substantially in arrear with payments under the maintenance order. He had, in fact, paid an amount which was more than sufficient to cover the sums due in discharge of the arrears under the suspended committal order for which, at all material times, he remained liable but not if, as was the contention of counsel for the wife, the sums paid were primarily allocated to the discharge of the current order for maintenance.

The registrar refused the application and referred the matter to the judge:—

1958

O'MAHONEY v. O'MAHONEY.

Held, (1) that, in determining to what extent the sums paid by the husband after March, 1958, were allocated towards the discharge of his liability for arrears under the suspended committal order or the discharge of his liability under the current order, the material consideration was not his intention, based on his conception or misconception of his liability, but the real nature of his liability in law.

(2) That the order for maintenance of March, 1958, could not be a "judgment" for the purposes of a suspended committal order at the date of the making of which it was not in existence; sums paid by the husband after March, 1958, were not, therefore, to be deemed to be primarily in discharge of the sums due under that order and, the terms of the suspended committal order having been complied with, the application must be refused.

APPLICATION for leave to issue an order for committal.

On August 29, 1956, the husband filed a petition for dissolution of marriage on the grounds of cruelty and adultery, and on February 21, 1957, he was granted leave to file a supplemental petition alleging the same grounds. On March 4, 1957, the respondent wife filed an answer denying both charges and charging the husband with cruelty and adultery. There was a cross-prayer for relief and for custody of the two children of the marriage.

On April 2, 1957, Mr. Registrar Compton Miller made an order for alimony pending suit at the rate of £1 a week as from March 16, 1957, and for maintenance of the children pending suit of £1 a week for the girl and 10s. a week for the boy as from the same date.

The husband did not proceed with the charge in his petition and supplemental petition, and on August 9, 1957, the registrar ordered that proceedings arising from the prayer of the petition be stayed, and that the cause should proceed upon the prayer in the wife's answer. On November 29, 1957, the wife was granted a decree nisi upon both grounds alleged in the answer.

Meanwhile, on November 11, 1957, on the hearing of a judgment summons in respect of default in payments amounting to £70, Barnard J. made a committal order, suspended so long as the husband paid, in addition to any sums accruing under the order of April 2, 1957, the sum of 2s. 6d. a week.

On January 14, 1958, the decree was made absolute and on March 19, 1958, an order was made by Mr. Registrar Compton Miller, dating as from the date of the decree absolute, for payment of maintenance to the wife during joint lives or until further order at the rate of £1 weekly, and for maintenance of

the elder child £1 10s. a week, and for the younger child £1 a week.

In September, 1958, by which date substantial arrears had accumulated under the order of March 19, 1958, an application was made to Mr. Registrar Wilkinson for leave to issue the suspended committal order of November 11, 1957. From January 14, 1958, until March 19, 1958, payments amounting to £15 10s. were made, and, until the application to the registrar, total payments amounted to some £40, more than sufficient to cover the liability to discharge arrears imposed on the husband by the suspended committal order. The payments were at all times irregular in amount.

The registrar, holding that rule 6 (3) of the Matrimonial Causes (Judgment Summons) Rules, 1952,[1] did not apply to the circumstances of the present summons, refused the application and made a report setting out the reasons therefor which, after referring to the cessor of liability under the order of April 2, 1957, on January 14, 1958, and to the fact that the payments made thereafter were more than sufficient to cover the payments off arrears at 2s. 6d. a week for which the husband remained liable, read as follows:

" . . . he " (the husband) " has been liable, under a mainten- " ance order dated March 19, 1958, and operative as from January " 14, 1958, for maintenance at £3 10s. a week; but this is a subse- " quent order that is not connected with the judgment summons " and commitment order. The payments since the decree " absolute have been irregular in date and amount, and I am not " prepared to say that they are not partly (or even wholly) allo- " cated to the judgment debt. The fact that he is seriously in " arrears in respect of the new maintenance order does not mean " that all payments must be allocated to those arrears. . . ."

The registrar then referred the matter to a judge. On the hearing of the reference letters, which were not before the registrar, written by the husband on the making of certain of the payments were before the court. The husband appeared in person, the matter having been previously adjourned in order that he might be present.

[1] Matrimonial Causes (Judgment Summons) Rules, 1952, r. 6 (3): " If " an order for commitment is sus- " pended . . . on terms . . . all pay- " ments thereafter made under the " order shall be deemed to be made, " first, in or towards the discharge of " any sums from time to time accru- " ing due under the judgment and " secondly, in or towards the discharge " of the debt in respect of which the " judgment summons was issued . . ."

1958

O'MAHONEY v. O'MAHONEY.

A. B. Ewbank for the judgment creditor. It is conceded that, if the registrar was right in law in holding that the payments in fact made by the judgment debtor were not to be allocated wholly towards the discharge of payments under the current order, then he has paid sufficient to comply with the terms of the committal order.

It is, however, submitted that the registrar was not right in so holding and that, in circumstances such as the present, the question to the discharge of which debt the payments made were allocated is governed by the intention of the debtor at the time of making the payments. From the nature of the amounts paid and from the letters which accompanied some of the payments it is to be inferred that this debtor did not intend more than a small proportion of the payments to be credited to the arrears.

Alternatively, where there is an order for payment of alimony or maintenance for children before decree absolute, followed by an order for permanent maintenance, it is submitted that both orders amount to one judgment for the purpose of rule 6 (3) of the Matrimonial Causes (Judgment Summons) Rules, 1952. [Rule 1 (3) of the Rules of 1952 was referred to as to the interpretation of "judgment."] It is true that alimony is invariably referred to as alimony pending suit, but in section 32 of the Matrimonial Causes Act, 1857, the words used are "interim order for the pay- "ment of money or otherwise," and, since that date, similar words have been used in all the statutes, including section 19 (1) of the Act of 1950. "Interim" clearly envisages something which is temporary and which may be succeeded by an order which is permanent. To regard an order for alimony pending suit and an order for maintenance as separate orders is inconsistent with the Acts. It is therefore submitted that the true position with regard to orders made in favour of a wife, both pending suit and after decree absolute, is analogous to orders made in respect of children. [Section 26 (1) of the Act of 1950 was referred to.] Where an order is made in favour of a child or children before decree there is no question of that order being pending suit or necessarily interim, and if such an order is made after decree absolute it is submitted that both orders would constitute one judgment.

[COLLINGWOOD J. Do you say that if your second point is valid it applies irrespective of intention?]

That is so.

Cur. adv. vult.

November 24, 1958. COLLINGWOOD J., reading his judgment, referred to the facts and continued: In the first place it is to be noted that the order made on April 2, 1957, by Mr. Registrar Compton Miller (on which the committal order was made by Barnard J. on November 11, 1957) was limited in regard to the children in exactly the same way as in regard to the wife, that is to say, it was an order to pay "pending suit." It was not, therefore, an order which continued until replaced by another order, although counsel described it as an interim order; it automatically ceased to have effect on January 14, 1958, when the decree was made absolute. It follows, in my opinion, that as from January 14, 1958, until March 19, 1958, when the maintenance order was made, the husband's only liability was to continue the payment of 2s. 6d. weekly towards the arrears.

The fact that, subsquent to the decree absolute, a maintenance order has been made on March 19, 1958, directing the husband to pay £3 10s. a week, as from the date of the decree absolute, has, in my opinion, no effect whatever on the order made on the judgment summons in November, 1957. Between January 14, 1958, when his liability under the first order ceased (save as to 2s. 6d. weekly off arrears) and March 19, 1958, when an entirely fresh liability was imposed upon the husband, he made payments totalling £15 10s., which represents 124 payments of 2s. 6d.

It was contended, on behalf of the judgment creditor, that it was necessary only to look at the debtor's intention as regards these payments, an intention to be derived from the letters accompanying them and the amounts of the payments made. But I think it is necessary to have regard, not to his conception or misconception as to his liability during that period, but to what his liability in law really was. It was further urged that, irrespective of the debtor's intention, both the orders, that for alimony and maintenance of children pendente lite, and that for permanent maintenance, are really one judgment under the Matrimonial Causes (Judgment Summons) Rules, 1952. This submission I have already dealt with. It is important to remember that the whole basis of committal under section 5 of the Debtors Act, 1869, and the Rules of 1952 is deliberate contempt of court, arising from a failure to pay that which the court, after inquiry as to means, is satisfied that the debtor is able to pay. It seems to me impossible to apply a committal order to a liability due under an order for maintenance which was not in existence at the date of the making of the committal order.

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In my opinion the registrar was right in the view which he took, and leave to issue an order for committal must be refused.

Order accordingly.

Solicitors: *Law Society, Divorce Department* (*J. A. H. Powell*).

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Nov. 6, 10, 11.

Hodson, Morris and Ormerod L.JJ.

In re CUTCLIFFE'S ESTATE. LE DUC *v.* VENESS AND ANOTHER.

[1956 C. No. 1643.]

Probate—Costs of action—Contested probate action—Will duly executed by testator—Contemporaneous declarations by testator that will did not represent his wishes—Whether conduct of testator caused litigation—Whether unsuccessful litigant misled as to testator's intentions entitled to costs out of estate—Unsuccessful plea of undue influence—Rules and exceptions to rules of practice as to costs in probate actions.

The plaintiff, a blind widow, asked for probate of a will in her favour executed on January 31, 1955, by a testator, her stepfather, who died, aged 84, three weeks later. The defendants, a father and daughter, executors and beneficiaries under a will executed by the testator in August, 1954, alleged that the execution of the will of January, 1955, was obtained by undue influence of the stepdaughter, and, alternatively, that it was made without the testator's knowledge and approval; and by a counterclaim they asked that probate be decreed for the will of August, 1954.

The stepdaughter had lived with and looked after the testator until 1954, but left him after one of a series of quarrels and did not return to his house to live, though she visited him in hospital and at his home towards the end of his life. The defendants, who had been tenants of part of the testator's house since 1952, looked after him continuously after the stepdaughter left. The will in their favour was executed in the presence of a solicitor who had drawn it on the testator's instructions, and it was attested by him and by the testator's own doctor. On January 19, 1955, the testator had an interview with the solicitor, asking for reassurance that his will in favour of the defendants was in order, being under the impression that his "pestering relatives" had wanted him to sign a document which might be a will, and being unable to recall whether he had signed such a document or not. On January 31, 1955, the stepdaughter and two women known to her and to the testator, called on him with a prepared typewritten will in favour of the stepdaughter; and that will was executed by the testator in her presence and was attested by the two women. Two hours later the testator wrote out and signed a document as follows: "9 hrs. 25 mts. January 31,

"1955. This is to certify that I . . . have not signed any any "document on the above date which I wish to be classified as valid "and in accordance with my wishes." He died on February 24, 1955.

On the trial of the action the judge held that the plea of undue influence failed, and expressly rejected as "invention" direct evidence on that issue given on behalf of the defendants. On the issue whether the testator knew and approved of the contents of the will the judge held that the circumstances were such as to require the stepdaughter to discharge the onus of showing the righteousness of the transaction, but that she had discharged that onus; and he pronounced for the will in her favour.

On the order as to costs, the judge rejected the submission for the defendants that costs should be paid out of the estate on the ground that the litigation had been caused by the conduct of the testator, and ordered that the defendants should pay the costs of the action. On appeal by the defendants against the order as to costs:—

Held, dismissing the appeal, (1) that the judge had rightly followed the ordinary rule of practice applicable in the Probate as in other Divisions that the unsuccessful party should pay the costs of the action; a fortiori where a plea of undue influence had been put forward, supported by direct evidence which had been expressly disbelieved.

(2) That the case did not fall within that exception to the ordinary rule as to costs, whereby judges in probate actions could in the exercise of their discretion award costs out of the estate to an unsuccessful party if the litigation had been caused by the conduct of the testator or of the residuary legatee; for conduct of the testator which, as here, merely had the effect of misleading parties and inspiring false hopes as to his testamentary intentions was outside the range of possible circumstances which might constitute "the fault of the testator causing the litigation." Nor, on the evidence, was the conduct of this residuary legatee the cause of this litigation.

Principles as to costs in probate actions stated by Sir Gorell Barnes P. in *Spiers* v. *English* [1907] P. 122 applied.

Mitchell v. *Gard* (1863) 3 Sw. & Tr. 275 and *Tyrrell* v. *Painton* [1894] P. 151 considered.

Decision of Collingwood J. affirmed.

APPEAL from Collingwood J. with leave against order as to costs.

The plaintiff, Mrs. Annie Le Duc, widow, as executrix, asked for probate of the will dated January 31, 1955, of Edmund Perrin Cutcliffe, her stepfather, who died at the age of 84 on February 24, 1955. A caveat was entered by the defendants, Albert Edward Veness and his daughter, Maureen Beatrice Elizabeth Veness, as executors and beneficiaries of an earlier will of the testator dated August 23, 1954. By their defence to the plaintiff's writ they claimed, inter alia, (a) that the execution

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of the will of January 31, 1955, was obtained by the undue influence of the plaintiff, and (b) that at the time of its execution the testator neither knew nor approved of its contents. By way of counterclaim they asked the court to pronounce against the will and to decree probate of the will of August, 1954.

The plaintiff had lived with the testator in a house, 9, Shirley Road, Bedford Park, Chiswick, after the death in 1941 of her mother, who had married the testator in 1910; and she had looked after him continuously. She was nearly blind and the testator was not only old but also ill and bedridden. She looked after him with no great pleasure on her part or even apparent gratitude on his, and there were frequent quarrels. In June, 1954, there was a quarrel between them which immediately preceded the stepdaughter leaving the house and going to a home for the blind, and she never returned to the house to live.

The defendant, Albert Veness, as from June, 1952, lived in an upstairs first-floor flat with his wife and the second defendant, their daughter Maureen, paying £3 a week rent to the testator; and from June, 1954, when the stepdaughter left, the Venesses looked after the testator, taking him his food and nursing him generally.

In August, 1954, the testator made a will in favour of the Venesses. For that purpose he called in a solicitor, one R. B., who saw him and was able to take instructions for the will and had a conversation with him about his relations and about his stepdaughter, the present plaintiff. On August 23 that will was executed by the testator in the presence of the solicitor, who was one witness, and the testator's own doctor, who was the other attesting witness. The effect of the will was to leave the property, consisting in the main of a leasehold house, to trustees for the daughter Maureen, the trustees to grant the first-floor flat to Albert Veness and his wife at a nominal rent.

At the trial of the action there was some evidence that, while the testator was in hospital for the first time between December 20 and January 11 the stepdaughter visited him there, and on one occasion was accompanied by a man, who spoke to the sister in the hospital and asked her if she was prepared to witness a will. There was no evidence as to the contents of any document which might have existed at that time. The sister did not give any evidence about it, and nothing further was known of it.

On January 19, 1955, after the testator had returned to his home, the solicitor R. B. attended the testator at 9, Shirley Road. He had been sent for because the testator was concerned

about his affairs and wished to know if they were in order. The solicitor's note on his attendance stated as follows: "His "relations (not blood relations) had been pestering him in hospital "and since he had been home. He said they were a lot of blasted "scoundrels and he was determined that whatever they did they "would get nothing from him. He asked me to tell him how he "had left his affairs. He was perfectly coherent and understood "what I said, but his memory was not too good. I explained "to him the will he had made on August 23, 1954, and that he "had left everything to Mr. Veness's daughter. He smiled and "nodded and asked if he could rely on that because that was "what he wanted, and he was worried about what those relatives "who had been pestering him of late had been doing. I told "him not to worry and that his affairs were in order as he "required. He asked if the relatives could have the will set "aside because he seemed to think that he had been pressed to "sign some paper by one of them recently . . . I asked him if "he had at any time signed any paper which he believed to be "another will. He did not remember doing so and felt very ill "when in hospital but did recall being asked by one of the "relatives—a nephew by marriage—to sign something but did "not remember whether he did or not. He then said: 'Blast "'them, they kept pestering me and they still come here and he' "(meaning Veness) 'lets them see me.' I replied that such "paper if purporting to be a will would be invalid and that he "could rely on my word that his affairs were in order as he "desired."

On January 31, 1955, at about 7.30 p.m., the testator—whose health was not improving, though he was on all the evidence of sound mind—saw the stepdaughter and two other ladies known to her and to him—Mrs. C. and Mrs. B.—who came to his house, bringing with them a will in typewritten form, said to have been prepared by the father-in-law of Mrs. C., a retired solicitor's managing clerk (who had died before the trial of the action). It provided as follows: "I . . . hereby revoke all former wills . . . "and declare this to be my last will. I appoint my stepdaughter "Annie Moseley Le Duc . . . to be the sole executrix of my will. "I give devise and bequeath all my real and personal estate "whatsoever and wheresoever unto the said Annie Moseley Le "Duc absolutely for her sole use and benefit." That will was duly executed and signed by the testator and was witnessed by Mrs. C. who signed herself as "secretary" and by Mrs. B.

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The evidence given by the two attesting witnesses commended itself to the trial judge, who found that the deceased knew perfectly well what he was doing and fully understood its effect, and indeed had quite a long conversation over a period of some 40 minutes with the ladies.

Two hours later the testator wrote out in his own handwriting, rather shakily but with a firm signature, the following document: "9 hrs. 25 mts. January 31, 1955. This is to certify that I "Edmund Perrin Cutcliffe of number nine (9) Shirley Road, "Chiswick, W.4, have not signed any any document on the "above date which I wish to be classified as valid and in "accordance with my wishes. Edmund Perrin Cutcliffe."

That certificate was shown to Albert Veness by the testator on that same evening and was put into a box beside the testator's bed. After his death it came to the knowledge and into the possession of the solicitor R. B. On February 22 the testator was again removed to hospital where he died on February 24.

Part of the evidence of Albert Veness as to what was done with the certificate, and as to the physical condition of the testator on that date, was rejected by the judge in his judgment on May 31, 1958. The judge also rejected the evidence of Mrs. Veness that, while standing outside the door of the testator's bedroom on the evening of January 31 while the three ladies were with him, she had heard a crescendo of the words "Sign, sign, "sign," uttered by the stepdaughter. The judge described that as an invention; and he accepted the evidence of the two attesting witnesses on what had taken place in the testator's bedroom when the will was executed.

The judge said that the allegation of undue influence might be summarized thus: that the stepdaughter had taken advantage of the testator's age and illness, and had induced him to make a will in her favour, knowing that he was not fit to understand what he was doing; and that she had not been called to give evidence. But the judge said that he found it difficult to believe on the evidence that the stepdaughter was in a position to overbear the will of the testator; and he held that no undue influence had been proved.

His Lordship considered whether there was such an element surrounding the execution of the will as to make it incumbent on the stepdaughter propounding the will to satisfy the court as to the righteousness of the transaction, in accordance with the decision in *Tyrrell* v. *Painton*.[1] He held that it was such a case,

[1] [1894] P. 151.

but that, as he had accepted the evidence of the two attesting witnesses, the stepdaughter had, in his Lordship's view, affirmatively established that the will of January 31, 1955, was duly executed, that the testator knew and approved its contents, that it expressed his intention at the time, and that he knew what he was doing when he executed it. The judge accordingly pronounced for that will.

On the order for costs, counsel for the plaintiff asked that the defendants should pay the costs of the action, since the evidence of Mrs. Veness had been disbelieved and the defendants had failed on the issue of undue influence. Counsel for the defendants asked that the costs should be paid out of the estate on the ground that the action of the testator himself in making the certificate of January 31 had caused the present litigation. The judge rejected that submission, on the ground that the substantial dispute had been on the allegation of undue influence, "an allegation which ought not to be put forward without very strong "grounds." He ordered that the defendants should pay the costs.

The defendants entered a notice of appeal against the decision on the substantive issues, but later withdrew it, and appealed only on the order as to costs, with the leave of the judge.

C. L. Hawser for the defendants. First, the general conduct of this testator and, in particular, his making of the certificate of January 31 was the cause of this litigation, and therefore the order as to costs falls within one of the important exceptions, established in probate actions, to the general rule of practice that costs should follow the event; and the order which should have been made on this ground was that the costs of the unsuccessful defendants should have been paid out of the estate.

It is conceded that, having put forward a plea of undue influence and having failed on that, these defendants might be called on to pay the costs of that issue if the plea had not been put forward on reasonable grounds. But the plea here was put forward on reasonable grounds, and in all the circumstances of the case those costs, too, should be paid out of the estate. In *Mitchell* v. *Gard*[2] the losing party had put forward a plea of undue influence, but the court relieved him of his general costs; and in *Orton* v. *Smith*,[3] where charges both of undue influence and of fraud failed, Sir James Hannen allowed the unsuccessful

[2] (1863) 3 Sw. & Tr. 275.

[3] (1873) L.R. 3 P. & M. 23.

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party the costs out of the estate on the ground that if the testator left his testamentary papers in such a state as to excite the suspicion of the court, that was the right order to make on the consequent litigation.

[HODSON L.J. *Mitchell* v. *Gard* [4] was an exceptional case; and in *Orton* v. *Smith*,[5] where the testator had patched up his signature, it could properly be said to be his fault that there was litigation. But if a testator merely misleads his relatives as to what he intends to do with his money, that does not come within the scope of "fault of the testator." In any event, the certificate of January 31 was not a testamentary paper.]

In *Davies* v. *Gregory* [6] the confusion resulting in litigation was caused by the conduct of the testator and not by the actual testamentary papers, but the unsuccessful party was given costs out of the estate, and Sir James Hannen [7] indicated that in probate actions the doctrine of vae victis does not apply fully.

[HODSON L.J. I think it does. Those old decisions have been superseded by the principles stated in *Spiers* v. *English* [8] by Sir Gorell Barnes P., and those principles have been followed as the practice, or custom, on costs in probate actions ever since 1907 and were referred to with approval in the Court of Appeal in *In the Estate of Plant*.[9]]

The approval was obiter only. There is no decision of the Court of Appeal directly on this matter. *Wilson* v. *Bassil* [10] is relied on as authority for the proposition that where it is proper for the court to inquire, the party who raises the inquiry shall have his costs out of the estate. In that case both undue influence and fraud were raised unsuccessfully, and Walton J. made the order contended for here.

[HODSON L.J. A decision of Walton J., who did not normally sit in the Probate Division, would not have the authority for this court of a decision of Sir Gorell Barnes P. on a probate action.]

But Walton J. purported to follow *Orton* v. *Smith* [11] and *Davies* v. *Gregory*.[12] [*Thomas* v. *Jones*,[13] *Levy* v. *Leo* [14] and *Oldcorn* v. *Tenniswood* [15] were also referred to.]

Secondly, on want of knowledge and approval, the judge found that this case was of the class considered in *Tyrrell* v. *Painton*,[16]

[4] 3 Sw. & Tr. 275.
[5] L.R. 3 P. & M. 23.
[6] (1873) L.R. 3 P. & M. 28.
[7] Ibid. 31.
[8] [1907] P. 122.
[9] [1926] P. 139; 42 T.L.R. 443.
[10] [1903] P. 239.
[11] L.R. 3 P. & M. 23.
[12] L.R. 3 P. & M. 28.
[13] [1928] P. 162; 44 T.L.R. 467.
[14] (1909) 25 T.L.R. 717.
[15] (1909) 25 T.L.R. 825.
[16] [1894] P. 151.

where the circumstances were such as to arouse the suspicion of the court, an inquiry was proper, and the onus was on the person propounding the will to show that it was the testator's true will. [*Barry* v. *Butlin*[17] was also referred to.] In the present case the person propounding the will did not go into the witness-box, and though the judge held that on the evidence of the attesting witnesses she had discharged the onus on her, the proper order ought still to be general costs out of the estate, or, at the worst, no order as to costs. Almost all the costs incurred here would have been incurred if there had been no plea of undue influence and the evidence would have been substantially the same.

[HODSON L.J. You have to show that the judge exercised his discretion on wrong principles. How can it be said that a judge who disbelieved the only direct evidence on the issue of undue influence exercised his discretion as to costs on wrong principles when he awarded costs against the defendants who put forward that plea?]

If there are suspicious circumstances warranting investigation, one is entitled to plead undue influence.

[HODSON L.J. It is the other way round. Once that plea is raised, the party raising it should be advised that he will have to pay the costs of it if he loses. It is not a plea which should be added for good measure.]

If the defendants had confined themselves to the issue of a case for inquiry on the principle laid down in *Tyrrell* v. *Painton*,[18] they would have been given the costs out of the estate, even if unsuccessful.

[HODSON L.J. No. The rule of practice is: Case for inquiry —no order as to costs; fault of testator or residuary legatee— costs out of the estate.]

Thirdly, on the exercise of the discretion, the judge has given leave to appeal against his order, and therefore this court can consider the whole question of costs afresh.

[HODSON L.J. I never take the view that if a judge gives leave to appeal in a discretionary matter he is saying thereby: "I am not sure that I am quite right." I am prepared to assume that all judges always believe that they are absolutely right; but even then they give leave to appeal.]

Victor Williams for the plaintiff. By withdrawing their original notice of appeal on the substantive issues and replacing it by a notice of appeal limited to costs, the defendants have

[17] (1838) 2 Moo.P.C. 480.

[18] [1894] P. 151.

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accepted all the judge's findings, and it becomes impossible for them to contend that the judge exercised his discretion on any wrong principle. *Spiers* v. *English* [19] laid down the guiding principles on costs in probate actions and no later authority casts any doubt on the principles there stated, which include the principle that an unsuccessful plea of undue influence is never the subject for "no order as to costs." The crux of this case was the evidence on undue influence which was expressly rejected as an invention.

[MORRIS L.J. Was not the crux of this case the certificate of January 31? It immediately threw doubt on whether the testator knew and approved of what he had signed two hours before.]

Once the judge found that the suit was bolstered up by evidence which was fabricated, it would be strange if he allowed people to reimburse themselves from any part of the estate for any money they had spent on a case bolstered up by their own lies. The evidence of the two attesting witnesses satisfied the judge that the testator knew and approved of the contents of this will.

[MORRIS L.J. It seems to me that in *Spiers* v. *English* [19] the court differentiated between the different allegations and indicated that it was open to a court to make different orders as to costs on different allegations: see *per* Sir Gorell Barnes P.[20] that "the whole case turned on the position of the defendant." Only one order as to costs was made in that case; but does not the judgment show that in a different situation a judge could say that on the issue of knowledge and approval there should be, for instance, an order for costs out of the estate, while on the unsuccessful plea of undue influence the unsuccessful party should pay? The judge in this case seems to have thought that he could make only one order.]

Without the evidence of the Venesses there was no case here for attacking this will.

[HODSON L.J. The defendants had a good case within the principle of *Tyrrell* v. *Painton*,[21] quite apart from the fact that the plaintiff was not called to prove the righteousness of the transaction.]

The two attesting witnesses had known the testator for a long time.

[19] [1907] P. 122.
[20] Ibid. 124.
[21] [1894] P. 151.

[HODSON L.J. They did not prepare the will and no one was called who had instructions to draw it.]

It was a simple will.

[HODSON L.J. Wills are generally simple when everything is left to one person. The interview of the testator with the solicitor supports the view that the testator might not have known and approved the contents of the will.]

There was never any suggestion in the evidence that the plaintiff had seen the testator alone at the material time. She was blind and had to be led about. The person who prepared the will was dead at the time of the hearing, but he might have been instructed by the testator, whom he had known for some time.

[HODSON L.J. There is a gap in the evidence, which was the very gap which existed in *Tyrrell* v. *Painton*.[21]]

It is not insurmountable, and in any event this is not an appeal on the substantive issues, so the judge's findings have to be accepted.

Hawser in reply. The crux of this case was not the evidence which was disbelieved by the judge. Once the court has to investigate the matter, it must have regard to all the circumstances, including the known bad relations between the testator and the plaintiff. Though the plaintiff had to be led about, it was her son who led her about, and he might have been able to assist the court if he had given evidence.

HODSON L.J. The appeal being as to costs only, it is necessary to state what the position is. First of all, the leave of the judge was given, but, nevertheless, orders as to costs are made in the exercise of discretion and are not readily reviewed unless the court is satisfied that there has been a real error.

So far as any rule of practice is concerned as to costs in probate actions, it is well to remember the wise words of Sir James Wilde in *Mitchell* v. *Gard*[1]: "These questions of costs "are addressed to the discretion of the court. It is hardly in "the nature of discretion that its exercise should be adjusted "by exact rule. No positive regulation could be established "that would bear the strain put upon it by the justice or hardship "of particular instances. But, where all is not possible, some-"thing may yet be done. By acknowledged method and general "classification, the suitor may in some measure be enabled to

[1] (1863) 3 Sw. & Tr. 275, 277.

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" estimate the prospect before him, and foresee the penalties " under which he launches into litigation. To this extent it is the " duty of the court, so far as may be, to assist him." It is very important to bear in mind those words when dealing with authorities which purport to lay down general principles on which the exercise of discretion as to costs in these cases is considered.

The most convenient case in which to find the principles on which the Probate Court exercises its discretion as to costs is *Spiers* v. *English*.[2] The headnote sets out the principle very clearly in this way[2]: " The two main principles which should " guide the court in determining that costs in a probate suit are " not to follow the event are, firstly, where the testator or those " interested in the residue have been the cause of the litigation; " and, secondly, if the circumstances lead reasonably to an " investigation in regard to a propounded document. In this " latter case the costs may be left to be borne by those who " incurred them; in the former, the costs of unsuccessfully " opposing probate may be ordered to be paid out of the estate. " Neither of those principles, which, however, are not exhaustive, " justifies a plea of undue influence unless there were reasonable " grounds for putting it forward." The plaintiff, who was a nephew and one of the next-of-kin of Charlotte Spiers, alleged that a will of 1905 was not duly executed, that the deceased did not know and approve of the contents thereof, and that the purported execution was obtained by the undue influence of the defendant. The jury found for the defendant on all the issues, and the court pronounced for the will. The plaintiff—and this is the relevant point—asked for costs out of the estate, or, alternatively, that the court should direct that each party should pay his own costs. The judge came to the conclusion that the plaintiff had not shown any ground on which he ought to order that the costs of the plaintiff should be paid out of the estate, and, therefore, would not interfere with the ordinary rule that the costs follow the event. Sir Gorell Barnes P. was there referring to the ordinary rule that the loser pays. In approaching that conclusion he stated the principles set out in the headnote, and was affected by the fact that, although there was an onus on the defendant to show that the testatrix knew and approved of the contents of her will, the plea of undue influence ought never to have been put forward unless the party raising that plea had reasonable grounds on which to support it. In that situation the

[2] [1907] P. 122.

order which he made was the ordinary order that costs follow the event, which indeed was the ordinary order which the judge made in this case.

Spiers v. *English* [2] was cited in this court in *In the Estate of Plant, Wild* v. *Plant*,[3] apparently with approval, and, so far as I know, that statement of principle as a useful guide to judges who have to exercise their discretion in matters of costs in probate actions has been consistently followed since 1907.

The present case as put before this court was that the judge was in error, in that he did not, at any rate in part, relieve the defendants from the burden of costs, because it is said that it was the fault of the testator that this litigation had been brought about; or, if not the fault of the testator, it was the fault of the beneficiary, namely, Mrs. Le Duc, the residuary legatee. Of course, if either of those qualities were to attach to this case, the judge would be expected, in accordance with the usual practice, to allow the defendants' costs out of the estate, at any rate so far as the issue of knowledge and approval was concerned, although it is admitted that it would be proper to penalize the defendants because they had put forward a plea of undue influence which had failed. [His Lordship then stated the facts set out above, and continued:]

So far as undue influence was concerned, there was no other evidence which could be described as direct evidence of undue influence except the evidence by Mrs. Veness that she heard a crescendo of words "Sign, sign, sign," while standing outside the door while the testator was being, so it was alleged, compelled to sign the will by the stepdaughter who, according to the evidence, had previously been frightened of him rather than he of her. That evidence was expressly rejected by the judge, and, in my opinion, there was no other direct evidence of undue influence. There was evidence as to the weak condition of this man, who was 84 and died in February, 1955, so that he might be fairly described as then a dying man. But the evidence of the defendants' witnesses was undoubtedly regarded by the judge as being greatly exaggerated. He did not accept it; and the evidence of Dr. Winder, which the judge stated he accepted, does not give such a sad picture of the physical condition of the testator as Veness had sought to give. The document of January 31 and the conversation on January 19 are not in themselves evidence of undue influence against the stepdaughter; but, in my judgment.

[2] [1907] P. 122.

[3] [1926] P. 139; 42 T.L.R. 443.

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they are relevant in considering whether the testator knew and approved of the contents of his will dated January 31. They would come under the heading of circumstances which are likely to arouse suspicion in ascertaining facts relating to the execution of the will. The category of these circumstances is not closed, as is shown by the judgment of the Privy Council in *Barry* v. *Butlin*.[4] As for undue influence, not only did the defendants fail to establish their case, which was based on the very minimum of direct evidence, but the judge specifically rejected as untruthful the evidence of Mrs. Veness, which was intended to be direct evidence on the issue of undue influence, as to the words " Sign, " sign, sign."

On the other part of the case, the judge recognized that this was one of those cases where the suspicion of the court was aroused, and that the situation was parallel with that which existed in *Tyrrell* v. *Painton*.[5] In that case the testatrix had made wills in favour of the defendant in 1880 and in 1884, but afterwards became dissatisfied with him and made complaints against him. On November 7, 1892, she made a will leaving her property to the plaintiff. On November 9, two days later, the son of the defendant brought the testatrix a will prepared by him, leaving her property to the defendant. The will was executed by her in the presence of and attested by the son of the defendant and a young friend of his. The only evidence adduced by the defendant was that of the attesting witnesses, who were examined, and it was held on appeal that the evidence of the attesting witnesses was not sufficient to remove the suspicion arising from the circumstances under which the later will was prepared and executed, and that the former will must be established. The rule in *Barry* v. *Butlin*[6] was applied by the Court of Appeal, which reversed the decision of the trial judge and found for the earlier will. Davey L.J. said[7]: " It must not " be supposed that the principle in *Barry* v. *Butlin*[8] is confined " to cases where the person who prepares the will is the person " who takes the benefit under it—that is one state of things " which raises a suspicion; but the principle is, that wherever a " will is prepared under circumstances which raise a well- " grounded suspicion that it does not express the mind of the " testator, the court ought not to pronounce in favour of it " unless that suspicion is removed. Here the circumstances were

[4] (1838) 2 Moo.P.C. 480.
[5] [1894] P. 151.
[6] 2 Moo.P.C. 480.
[7] [1894] P. 151, 159.
[8] 2 Moo.P.C. 480.

"most suspicious, and the question a judge has to ask himself "is whether the defendants have discharged themselves of the "onus of showing the righteousness of the transaction, and with- "out going again over the circumstances which might have been "referred to, I am compelled to say that they have not."

This case was fought in part on what I may call the *Tyrrell* v. *Painton* [9] lines and in part on the plea of undue influence. The judge not only rejected the plea of undue influence but found that the plaintiff, although neither she nor her son was called as a witness, had established the will of January 31, as being the will of the testator. The person who was supposed to have prepared the will was a solicitor's managing clerk, who was dead. There was no real evidence that he had prepared the will. Although the evidence on the last will was limited to that of the attesting witnesses, the judge, having heard that evidence and having disbelieved the evidence of the Venesses, expressed himself satisfied that the will of January 31 was the will of the testator. There is now no appeal against that decision. The only appeal is on the question of costs.

On that question it is said that, somehow or other, the judge erred in the way in which he approached the exercise of his discretion. In my opinion, there was no error at all. He considered all those matters which it was material for him to consider, and the transcript of his judgment followed by argument of counsel and the observations of the judge on this topic of costs, shows that he did so.

I do not think, so far as the first exception in *Spiers* v. *English* [10] is concerned, that it can be said that this litigation was brought about by the fault of the testator. It has been argued that because the testator gave a statement to the solicitor on January 19 and left behind him this rather remarkable document of January 31, he was himself responsible for inviting litigation about his estate. I cannot myself subscribe to that view. While it would not be possible to limit the circumstances in which a testator is said to have promoted litigation by leaving his own affairs in confusion, I cannot think it should extend to cases where a testator by his words, either written or spoken, has misled other people, and perhaps inspired false hopes in their bosoms that they may benefit after his death. It does not seem to me that the judges who, in the past, have laid down the practice that costs should be allowed out of the estate where the fault of the

[9] [1894] P. 151.

[10] [1907] P. 122.

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testator has led to the litigation, had in mind such a situation as that. The common situation is that which arises day by day in the courts of construction where the testator has used language which is difficult to understand, and where he, by himself or by his solicitor, has created the difficulty; and there the costs are normally borne by the estate. That rule applies particularly in probate actions where, for example, execution is on the face of it doubtful and where, as in *Orton* v. *Smith*,[11] the testator had patched up his signature in such a way as to make a handwriting expert suggest that the signature was a forgery and not the signature of the testator at all. I do not think that there is any question here of the litigation being brought about by the fault of the testator.

Similarly, I do not think that any fault is to be attributed to the residuary legatee as being a cause of this litigation. I cannot see that anything can be attributed to her in the way in which this case developed. There was certainly no evidence of undue influence against her accepted by the judge. Unless there is some case of undue influence made out against her, or some reasonable ground for making such a case, there is nothing in the judge's findings as to her conduct which would make it right to say that this litigation was the fault of the residuary legatee. The way in which the judge approached the matter was clear from his concluding words, with which I find myself in complete agreement. When he had been addressed on the question of costs by counsel he showed first that he was in sympathy with the application made by Mr. Hawser for the defendants, because he remarked: "There is a lot to be said for the proposition that "it is the testator who is responsible for this litigation." It was only afterwards, when Mr. Victor Williams, for the plaintiff, had for the second time referred him back to his findings and to the fact that here was a case where there was a plea of undue influence in which the witnesses called to support it had been disbelieved, that the judge came down in favour of the order which he did make. He said with regard to the plea of undue influence: "It is a plea which should not be put forward without "very strong grounds—reasonable grounds at the very least— "and here, as I have already indicated, it has been supported in "the last resort by evidence which I cannot possibly accept— "unfounded evidence. Yes, I must say costs must be paid by "the defendants."

[11] (1873) L.R. 3 P. & M. 23.

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It seems to me a strong thing, which I should be slow to listen to, to maintain that people who give evidence which the judge finds to have been wholly false, who have lost their case, and who have had the costs given against them, should be heard to say that an order for costs should be made either wholly or in part in their favour on the ground that the court in exercising its discretion in these cases is in the habit of exercising it along certain lines and in accordance with certain principles. The discretion of the court is always there, and the rules on which that discretion is exercised are there for the assistance of those who have to advise litigants before they embark on litigation, so that they may have some idea of the risks they run as to costs. It must surely be obvious to anyone who has studied the history of litigation in the Probate Division, notwithstanding the exceptions which are to be found in the books, that where pleas of undue influence and pleas of fraud are made, the probability, at any rate, if they are unsuccessfully made, is that the people who make such charges and fail will be condemned in the costs not only of that charge but of the whole action.

The evidence in this case was the evidence of the Venesses, and it was directed not only to the question of want of knowledge and approval but also to that of undue influence. A great deal of evidence was directed to both those matters. It was not one of those cases where the defendants merely put the plaintiff to proof that the deceased knew and approved of the contents of the will. They took on themselves the task of proving, if they could, that not only was that onus not discharged but that the will itself was brought into existence by the undue influence of the plaintiff. That they wholly failed to prove. Having failed, and having failed because they were disbelieved, it seems to me inevitable that an order for costs would be made against them. I think that the order was rightly made and that this appeal should be dismissed.

MORRIS L.J. Notwithstanding the powerful submissions of Mr. Hawser, I have come to the same conclusion. Costs are always in the discretion of the court; but, without restricting or in any way making rigid the exercise of that discretion, the courts have given general guidance which will enable those embarking on litigation to know how, in particular cases, the discretion is likely to be exercised. In *Mitchell* v. *Gard* [12] it was

[12] 3 Sw. & Tr. 275.

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said: "From these considerations, the court deduces the two "following rules for its future guidance: first, if the cause of "litigation takes its origin in the fault of the testator or those "interested in the residue, the costs may properly be paid out of "the estate; secondly, if there be sufficient and reasonable "ground, looking to the knowledge and means of knowledge of "the opposing party, to question either the execution of the will "or the capacity of the testator, or to put forward a charge of "undue influence or fraud, the losing party may properly be "relieved from the costs of his successful opponent." In *Spiers* v. *English* [13] Sir Gorell Barnes P. used words much to the same effect: "One of those principles is that if a person who makes a "will or persons who are interested in the residue have been really "the cause of the litigation a case is made out for costs to come "out of the estate. Another principle is that, if the circum-"stances lead reasonably to an investigation of the matter, then "the costs may be left to be borne by those who have incurred "them."

In the present case, quite independently of the issue of undue influence, there were these questions: first, was the testator in any way responsible for the litigation? Was there fault in the testator? Secondly, was this a situation within the *Tyrrell* v. *Painton* [14] principle? As to the latter, the judge said that he thought it was within the principle indicated by *Tyrrell* v. *Painton*.[14]

In regard to the question whether the testator was responsible for the litigation, the judge did not, on the view that he formed, have to come to a final conclusion. But he clearly had in mind the matters which Mr. Hawser put before him. For example, he referred specifically to the evidence as to what had been said to the doctor. He also referred to the evidence of the solicitor and to the document that came into existence after the second will was signed.

The judge said that there was a lot to be said for the proposition that it was the testator who was responsible. But he did not proceed to decide that matter for this reason: It was put to the judge that the case had been fought substantially on the evidence of the Venesses, and that their evidence went very considerably to the issue of undue influence. That issue failed completely and it failed because the judge rejected their evidence and, indeed, called it unfounded evidence. Therefore, the judge

[13] [1907] P. 122, 123.

[14] [1894] P. 151.

took the view that, substantially, the case was fought on the evidence of those witnesses and on the issue of undue influence, and that the evidence of the Venesses had on many vital matters been positively rejected. I think that the judge, having that in mind and not forgetting the other considerations that had been put to him, came to the conclusion that the right order in the exercise of his discretion was that the costs should be paid by the defendants. I do not feel that I can say that the judge erred in coming to that conclusion.

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ORMEROD L.J. I agree, and I have nothing to add.

Appeal dismissed.

Solicitors: *Manches & Co.; Francis Taylor & Fryzer.*

M. M. H.

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Husband and Wife—Maintenance—Agreement—Variation by court—Deed for purpose of reconciliation—No jurisdiction to vary—Maintenance Agreements Act, 1957 (5 & 6 *Eliz.* 2, *c.* 35), *s.* 1 (1).

A husband applied to vary, under the provisions of the Maintenance Agreements Act, 1957, a deed entered into with his wife as a term of her forgiveness of his adultery:—

Held, that since the deed was made for the purposes of resuming cohabitation, and not for the purposes of the spouses living separately, the court had no jurisdiction under the statute to vary it.

ORIGINATING SUMMONS under section 1 of the Maintenance Agreements Act, 1957,[1] adjourned into court for judgment.

The husband and wife entered into a deed, which was not in

[1] Maintenance Agreements Act, 1957, s. 1: "(1) This section applies "to any agreement in writing "made, whether before or after the "commencement of this Act, between "the parties to a marriage for the "purposes of their living separately, "being—(*a*) an agreement containing "financial arrangements, whether "made during the continuance or "after the dissolution or annulment "of the marriage; or (*b*) a separation "agreement which contains no financial arrangements in a case where "no other agreement in writing between the same parties contains "such arrangements. . . . (3) Where "an agreement to which this

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form a separation agreement, on May 1, 1954, whereby certain financial arrangements were made between the parties. The husband applied to have these arrangements varied in his favour under the section, alleging certain changes in circumstances; the wife asserted that the deed, which she had agreed as a term of reconciliation, did not come within the Act at all. The following statement of facts leading up to, and subsequent to, the deed, and the summary of the terms of the deed, are taken from the judgment:

The parties were married on August 28, 1931. About the end of November, or early December, 1953, the husband had an illness. When he was lying in bed at the matrimonial home the wife accidentally intercepted a telephone conversation between the husband and a woman with whom, admittedly without the wife's knowledge, he had been committing adultery for some five years, and who had recently had a child of which he was the father, and he was forced to admit this association, which was a very great shock to the wife. She consulted her solicitors, and there was no doubt that she contemplated divorce

" section applies is for the time " being subsisting and the parties " thereto are for the time being either " both domiciled or both resident in " England, and on an application by " either party the High Court or, " subject to the next following sub- " section, a magistrates' court is " satisfied either—(*a*) that by reason " of a change in the circumstances in " the light of which any financial " arrangements contained in the agree- " ment were made or, as the case " may be, financial arrangements " were omitted therefrom, the agree- " ment should be altered so as to " make different, or, as the case may " be, so as to contain, financial " arrangements; or (*b*) that the agree- " ment does not contain proper finan- " cial arrangements with respect to " any child of the marriage, the court " may by order make such alterations " in the agreement by varying or " revoking any financial arrangements " contained therein or by inserting " therein financial arrangements for " the benefit of one of the parties " to the agreement or of a child of " the marriage as may appear to the " court to be just having regard to " all the circumstances or, as the case " may be, as may appear to the court " to be just in all the circumstances " in order to secure that the agree- " ment contains proper financial " arrangements with respect to any " child of the marriage; and the " agreement shall have effect there- " after as if any alteration made by " the order had been made by agree- " ment between the parties and for " valuable consideration:

" Provided that this subsection shall " not apply to an agreement made " more than six months after the " dissolution or annulment of the " marriage. . . . (6) In this section— " (*a*) the expression 'financial " 'arrangements' means provisions " governing the rights and liabilities " towards one another when living " separately of the parties to a mar- " riage (including a marriage which " has been dissolved or annulled) in " respect of the making or securing " of payments or the disposition or " use of any property, including such " rights and liabilities with respect " to the maintenance or education of " any child, whether or not a child " of the marriage . . . ;"

proceedings. The husband had just obtained new employment, which he thought would be jeopardized by the scandal of divorce proceedings, and the court found as a fact that he begged to be forgiven, and was fully cognizant of the outline of the terms on which the reconciliation should be effected. By letter dated December 21, 1953, the husband's solicitors wrote to the wife's solicitors stating that it was unnecessary for them to send the return of the husband's income for the year 1952–1953 because they had heard from him that his wife had agreed to resume married life with him on certain terms which were set out in the letter, the final version of the terms being comprised in the deed itself.

The deed was made between the husband of the first part, the wife of the second part, and two trustees for the wife, who were in fact members of her solicitor's firm. It described both the husband and the wife as being of "Astrope Folly," Puttenham, near Tring in the county of Hertford, a house that had been built for them about 1948, and in which they had lived together until the discovery of the husband's association.

The letter referred to stipulated that the house and the adjacent land should be transferred to the wife, and that the contents should be likewise transferred. The deed recited a conveyance of the freehold land and premises known as "Astrope "Folly" by deed of February 18, 1954, to the wife in fee simple for her own use and benefit absolutely, subject only as therein mentioned. (That reservation referred to an equitable mortgage by deposit of the title deeds for the sum of £3,000 due to the husband and his sister as the trustees of the trust created by their father's will.) The deed also recited that on the same day the husband had delivered to the wife manually the whole of the furniture and effects then in or about "Astrope Folly" aforesaid, to hold the same for her own use and benefit absolutely.

There followed a recital that the husband being desirous of making further amends to the wife, and of providing for her both before and after his death, had agreed to enter into the covenants thereafter contained. Shortly, they were as follows:

(a) To pay all expenses now or thereafter arising in connexion with "Astrope Folly," and at his own expense to keep the said property in good and satisfactory repair and condition, and pay all fire insurance premiums and the mortgage interest payable in respect of the said property and the equitable charge thereon:

(b) To execute a proper will, giving the whole of his estate

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both real and personal whatsoever and wheresoever to the wife for her own use and benefit absolutely, and not to revoke or alter the same during their joint lives.

(In fact a will to this effect had already been executed in 1952.)

(c) On the 1st of every month during their joint lives to pay a sum reasonably sufficient for her support and maintenance, and for the payment of household expenses of the kind usually paid by the wife out of moneys provided by the husband for such purpose, such sum in any event not to be less than £28 per month:

(d) In addition thereto to pay the trustees during the joint lives of the husband and wife such sum, called "the wife's personal allowance," as after deduction therefrom of income tax, and surtax, if any, would amount to the clear sum of £41 13s. 4d. per month, i.e., £500 a year:

(e) The husband also agreed to pay all the household and other expenses not payable by the wife out of the monthly sum mentioned in clause 1 (c);

(f) To pay all legal costs, charges, fees, etc., incurred by the wife in connexion with her matrimonial affairs including the preparation and completion of the agreement, and documents incidental thereto, and the recited conveyance; and

(g) Finally, he agreed at the request of the wife or the trustees and at his own expense forthwith to execute and do all such instruments, acts and things as the trustees or the wife might respectively require of him for the purpose of fully and effectually carrying out the terms of the agreement.

In consideration of the husband's covenants the wife covenanted:

(a) That so long as he should observe and perform his covenants she would not at any time thereafter take any proceedings against the husband in respect of any misconduct or alleged misconduct committed or alleged to have been committed prior to the date of the deed.

(b) On the same condition as to the husband's performance of his covenants, the wife covenanted to keep the husband indemnified against all debts or liabilities thereafter contracted or incurred by her, and to support and maintain herself, and not to pledge the husband's credit.

(c) Finally, the wife covenanted to pay the household expenses described in clause 1 (c) out of the moneys thereinbefore covenanted to be paid by the husband.

By clause 5 it was mutually agreed that if owing to ill-health, retirement or some other extenuating circumstance which the trustees should consider to be beyond the husband's control, the husband should satisfy the trustees that his means had so materially depreciated that he was unable to continue to pay in full the moneys covenanted to be paid under clause 1 (d), the wife would accept in lieu of the moneys so payable an annual sum which the trustees should decide from time to time as being equal to one third of the husband's total income without deduction except for income tax; or, alternatively, a sum equivalent to the annual income received or due to the husband under his father's will, whichever should be the greater amount. The husband had not produced the figures required by the trustees for this purpose as at the time this summons was heard.

There was no express provision in the deed for a resumption of cohabitation, but, as the letter of December 21, 1953, showed, the wife had then already agreed to resume married life. The court held upon the evidence that they had actually done so, and accepted the wife's evidence that they went together to spend Christmas, 1953, with her relations at Bournemouth. It was further held that except for a period of about 10 weeks in or about April, 1955, when the wife was absent in Canada, they lived together at " Astrope Folly " until August, 1956, when the husband returned to the woman the association with whom had been the cause of the temporary separation.

Joseph Jackson for the husband.
K. Bruce Campbell for the wife.

The hearing of oral evidence, in which the circumstances in which the deed had been entered into were investigated, and argument, was in chambers.

Cur. adv. vult.

LORD MERRIMAN P., reading his judgment, referred to the nature of the summons, and continued: At the first hearing on affidavit evidence each counsel claimed the right to cross-examine the other deponent, and counsel agreed, and indeed insisted, that in the absence of any express declaration on the face of the deed it was necessary to go into the circumstances in which the deed was made in order to ascertain whether or no the agreement was " made for the purposes of the parties living separately " so as to bring it within the scope of the Act. The originating summons

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was heard in chambers throughout, but as this was said to be the first case under the Maintenance Agreements Act, 1957, and to raise a question of jurisdiction, I have adjourned the giving of my judgment into open court.

The husband puts forward certain alleged changes in the circumstances, in the light of which the original agreement was made. But the wife asserts that the provisions of the deed in question do not come within the Act at all, and it is to this point that the evidence and the arguments have been directed—for, unless the Act of 1957 applies, it is common ground that I have no other jurisdiction, in the circumstances of this case, to reform the terms of this particular deed; and, therefore, there is no object in considering the alleged change of circumstances unless the court is satisfied that the Act applies.

It is now common ground that the agreement is not in form a separation agreement, but it is the husband's contention that its terms are consistent with its being designed to govern a separation, and do so by necessary implication.

The circumstances leading up to the deed may be outlined as follows: [His Lordship referred to those circumstances, and to the terms of the deed, substantially as set out above, and continued:]

The husband, in accordance with his affidavit of June 17, 1958, tried to persuade me in evidence that the background to the deed was what he called "a separation basis," and he pointed to the fact that he had given instructions to his accountants to negotiate with the Inland Revenue authorities on this basis.

I will deal with the oral evidence shortly.

So far as letters are concerned the matter stands as follows: First, there is the statement already referred to in the letter of December 21, 1953, when the husband is reported as having told his own solicitors that the wife had agreed to resume married life with him, and secondly, there is a letter from the husband's solicitors to the wife's solicitors, dated April 21, 1954, in which they acknowledge receipt of the deed of covenant (which it may be convenient now to mention, was originally executed on March 5, 1954, though for some reason in connexion with stamping, it was re-engrossed and executed again on May 1, 1954). The letter continues: "As we have now ascertained that our client's "accountants required the deed for production to the Inland "Revenue authorities on the basis that our respective clients had "separated, and as, of course, the deed was entered into on the "specific understanding that they should resume a normal

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"married life together, our client will not be entitled to any tax "benefit. We therefore return the deed to you and regret having "troubled you to send it to us."

The husband attempted to repudiate this admission on the ground that he changed his solicitors in or about June or July, 1954. It is true that the husband had then quarrelled with his original solicitors, but his new solicitors writing on January 19, 1956 (the first letter by them to which I have been referred), in dealing with the husband's liability under the deed in respect of certain disputed debts which had been incurred in connexion with the matrimonial home, said that the husband was most unwilling to publish a repudiation of liability "as he will go to almost any "length to preserve the peace with his wife."

The husband also disputed the admission on the ground that the parties were not living a normal married life in the sense that he asserted that he was unable to have sexual intercourse with the wife, and that there was constant friction between them. It is not unlikely that there was sexual coolness on the husband's part after he had transferred his affections elsewhere, or that the domestic atmosphere was inevitably affected by the double life that he was leading. However that may be, I am satisfied that the main source of contention was that the husband was keeping the wife short of money—in fact was spending it on the clandestine association with the other woman.

I prefer the wife's evidence as regards both sexual and money matters, and am satisfied that sexual relations had not ceased before the breach to be described, and continued after the reconciliation.

The husband was an unsatisfactory and unreliable witness. For example, I am satisfied that most of the subsequent friction while they were living together after the reconciliation was brought about because the husband was continually harassing his wife to cancel the deed. In this context I was referred to a letter written to the wife through "John," who was the wife's nephew, and admittedly acted on occasions as an intermediary between the husband and wife when tension arose. The husband wrote: "I "confirm that I will adhere to all the terms of the agreement. "I am perfectly sane in my mind and I am doing this voluntarily. "All harassing will stop. I love only you. Please come back. "I am ashamed of myself." Signed by the husband, with the postscript: "We will (? make) this a happy home again." Again, his complaint that the wife repudiated the reconciliation

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by a visit she made to Canada is disposed of by a letter that he wrote to her on April 1, 1955.

But the truth about the genesis of the deed gradually emerged in his oral evidence. In his examination-in-chief, after prevaricating about whether the wife had mentioned divorce, and then admitting that she had gone to her solicitors about divorce, he said that he did not want her to divorce him at that time. He was afraid of the scandal as he was just starting a new job; also because, as a strict Presbyterian, he had a great horror of divorce. He said that he never worked out whether, financially speaking, he could comply with the terms or not but instructed his solicitors to accept the terms, and referred to their letter of December 21, 1953. He also said that his wife had told him why she had proposed those particular terms, viz.: because her solicitor had advised her that as he had had this affair with the young woman, which had resulted in the birth of a child, it was very likely at his age that he would do the same thing again, either with the same or another young woman, and might start a young family; that when the deed was being prepared no amendments were proposed on his behalf; that he signed it to get peace and to avoid divorce; and that at the time they were both living at " Astrope " Folly " and continued (as already stated) to do so until August, 1956.

In cross-examination he repeated that he did not want a divorce, that he was primarily concerned with his new employment, so begged the wife to forgive him and start afresh. He agreed that the wife was most anxious that the association should cease, and that he should undertake not to see any more of the woman. He gave this undertaking, and I was referred to a postcard written by him to the woman, telling her that he had done so. Admittedly, he broke his promise soon after the deed was executed. Finally, he repeated the admission that he entered into the deed because he did not want his wife to divorce him, as he then thought she would do, and admitted that financial matters between himself and the wife were conducted in accordance with the deed.

It is really unnecessary to go into more detail as Mr. Jackson admitted at the conclusion of the evidence that on the facts he could not argue that the deed was made for the purposes of separation. He argued, however, that as a matter of law the agreement must be construed as being made for the purposes of the parties to a marriage living separately.

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This was put in two ways. First, starting with the premise that courts are not concerned with the financial arrangements of spouses living together (*Balfour* v. *Balfour* [1]), it was argued that the court should construe the statute as applying only to agreements which were not hitherto against public policy. Therefore, where the court has a choice whether to include or to exclude an agreement hitherto against public policy, then, unless the words of the statute are compelling, the court should construe it so as to include only such agreements as are not void as having hitherto been regarded as against public policy, such as agreements for future separation by spouses living together.

Admitting that a provision contemplating future separation of spouses in a deed executed by them while living apart, with the object and result of bringing them together as man and wife, is not void on the ground of public policy—see *In re Meyrick's Settlement* [2] and *Lurie* v. *Lurie* [3]—the court ought to decline to take cognizance of the agreement so far as it relates to the regulation of financial arrangements between spouses while living together, or, if it recognizes the reconciliation agreement at all, to do so on the basis that it impliedly regulates the financial provision in the event of a second breakdown, and, therefore, is made for the purposes of the parties living separately.

I am not impressed by this argument. I do not think that I am entitled to cut down the plain words of the statute in this artificial manner. In other words, the court in face of the plain words of the statute is not concerned with questions of public policy which are said to have prevailed before it was passed.

Secondly, the argument was put in a somewhat simpler form: namely, that where a husband and wife make a financial agreement which contemplates their living together in a state of reconciliation, the court will always infer, whether it is so expressed or not, that the agreement is intended to operate, even if the reconciliation should not endure. Every reconciliation, it was said, contains the seeds of a breakdown, and therefore an agreement like the present one should be looked at, not as governing only the period of reconciliation, but also as covering the event of the reconciliation not enduring; and it was pointed out that in section 1 (6) (*a*), defining the expression "financial agreements," the words "provisions governing the rights and liabilities towards "one another when living separately" are apt to apply to a

[1] [1919] 2 K.B. 571; 35 T.L.R. 609.

[2] [1921] 1 Ch. 311.

[3] 54 T.L.R. 889; [1938] 3 All E.R. 156.

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separation arising later on the breakdown of the contemplated reconciliation, thus bringing the agreement within the Act, even though it was made while the parties were living together, and says nothing whatever about separation.

Moreover, it was pointed out that the financial provisions themselves being either absolute, as in the case of the conveyance of "Astrope Folly," and the will made in the wife's favour, or for the joint lives, as in the case of the monetary provisions, are themselves apt to be applied if a state of separation supervenes.

In my opinion this argument is altogether too wide. What I am really asked to hold is that, because an agreement granting a life interest, and a fortiori one making an out-and-out provision, governs the rights and liabilities towards one another of the parties to it, at least during their joint lives, and because the event of the parties living separately is an event which may occur during their joint lives, any such agreement is one governing the rights and liabilities towards one another when living separately, and is made, therefore, for the purposes of their living separately.

This seems to me to make the duration of the agreed provision rather than the purpose or object with which the agreement is made the test of the applicability of the Act. In other words, it is contended that any eventuality, come what may, which can occur in the joint lives must necessarily be held to be a purpose of the agreement. One would, for example, be obliged to say that a life interest given to a wife by a post-nuptial settlement was a provision governing their rights and liabilities when living separately. Mr. Jackson did not shrink from accepting this illustration of his contention, and it is probably unprofitable to search for other examples.

In my opinion this interpretation makes nonsense of the terms of the Act.

I find as a fact, and so hold, that the deed was made for the purposes of resuming cohabitation, and not otherwise, and that it was not made for the purposes of the spouses living separately. It was, in fact, intended, if possible, to prevent a repetition of the separation.

In my judgment the originating summons fails for lack of jurisdiction and must be dismissed.

Solicitors: *M. A. Jacobs & Sons; Cardew-Smith & Ross.*

J. B. G.

CLAXTON *v.* CLAXTON.

1959
Jan. 19.

Lord Merriman P. and Stevenson J.

Husband and Wife—Justices—Rehearing ordered on appeal—Whether court rehearing case should read judgments of Divisional Court—Principles to be followed.

A wife applied to a court of summary jurisdiction for an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, but her complaint was dismissed. Her appeal to the Divisional Court was allowed and a rehearing was ordered. The question arose at the rehearing whether the justices should have before them a transcript of the judgments delivered when the appeal was allowed. On the question being referred to the Divisional Court for directions:—

Held, (1) that when justices are ordered to rehear a case because of a mistake of law, the transcript of the judgments of the Divisional Court should be considered by them so that they may avoid a repetition of that mistake.

(2) That when the rehearing is ordered because the Divisional Court have differed from the justices as to the inferences of fact to be drawn from the evidence, the justices who rehear the case ought to reach their own conclusions of fact upon the evidence then placed before them, without reference to what the Divisional Court had said as to the inferences to be drawn from the evidence given at the previous hearing.

(3) That if in the course of the rehearing any reference should be made to any supposed point on which the Divisional Court was alleged to have expressed an opinion, or if any attempt should be made to introduce any part of the reasoning of the justices who first heard the case upon a question of fact, then the whole matter would be open and the justices would not only be entitled, but would be bound, to let in the judgments of the Divisional Court.

Application for the directions of the Divisional Court in connection with the rehearing by the Kingston-upon-Hull justices of a wife's application for maintenance.

On April 18, 1957, the stipendiary magistrate for Kingston-upon-Hull dismissed a wife's complaint that her husband had deserted her and that he had wilfully neglected to provide reasonable maintenance for her. The husband did not give evidence. The wife appealed; and on October 17, 1958, the Divisional Court allowed her appeal and ordered a rehearing of her complaint by a panel of justices.

On December 29, 1958, at the rehearing before the Kingston-upon-Hull justices, counsel opening the wife's case proposed to read a transcript of the judgments of the Divisional Court which had been delivered at the hearing of the wife's appeal. The

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justices refused to allow this transcript to be read, and the case was adjourned so that the directions of the Divisional Court on this point could be obtained.

Mrs. E. K. Lane for the wife. If justices rehearing a case are kept in ignorance of the reasons given by the Divisional Court for ordering the rehearing, they may repeat the errors made by the first panel of justices. It would be unsatisfactory to place upon justices' clerks the responsibility for deciding whether or not the justices who are rehearing a case should be shown a transcript of the judgments of the Divisional Court which were delivered when the rehearing was ordered. It would be impracticable to say that justices ought not to see a particular judgment of the Divisional Court when that judgment may have been reported. [Reference was made to *Marjoram* v. *Marjoram* [1] and to the direction in *Harvey* v. *Harvey*.[2]]

J. S. Taylor, for the husband, was not called on.

LORD MERRIMAN P. This is a wife's application for directions in connection with a rehearing before a bench of justices for the Kingston-upon-Hull petty sessional division of a complaint by the wife which was the subject of an appeal to this court in June and October, 1958.

Put quite shortly, it was a case in which the stipendiary magistrate for that city had dismissed the wife's complaints of desertion and wilful neglect to maintain. The real fight was on the subject of desertion; whether, as the wife complained, she had or had not been expelled from the matrimonial home by conduct which, putting it in the shortest possible way, was said to be ill-treatment by her mother-in-law, condoned or acquiesced in without any protection afforded to her by the husband. The stipendiary magistrate came to the conclusion that the wife had not made out her complaint, and we had a very full trial before this court which included, amongst other things, an attempt to bring about a reconciliation, which was abortive.

[1] [1955] 1 W.L.R. 520; [1955] 2 All E.R. 1.

[2] [1955] 1 W.L.R. 975 (sub nom. *Practice Direction*); [1955] 3 All E.R. 82. The Practice Direction was as follows:

LORD MERRIMAN P. "I am now "in a position with the consent of "the Lord Chancellor to make the "following announcement: The Trea- "sury have agreed that transcripts "of the judgments of the Divisional "Court may be provided at the public "expense in all cases in which the "Divisional Court directs a rehearing "by magistrates, and in any other "cases which the court considers fit "for a transcript."

Looking back at my notes I see that we had before us a transcript of the evidence before the stipendiary magistrate which ran to some 70 pages of foolscap, and we had a certain amount of correspondence. Of one thing only we had no transcript, or copy, and that was the evidence of the husband, because he was not called to give evidence, in spite of figuring, as I have said, as the passive encourager, so it was suggested, of the treatment meted out to the wife by his mother.

The magistrate had taken a view of the case based on his interpretation of the evidence, which was set out at considerable length, in a very careful judgment; we took a different view, and, indeed, in certain respects on particular points we differed explicitly from the view taken by the stipendiary magistrate as to the effect of the evidence. But from first to last the question was purely one of the true inferences to be drawn upon the facts as we saw them, of course, only at secondhand, from a very full note and after hearing very full argument.

We decided that the case called for a rehearing, and it was made abundantly clear, in unmistakable language, by my brother who delivered the first judgment, with which, as I said, I wholeheartedly agreed, that the observations we had made in support of our view that different inferences of fact should be drawn from those which had been drawn by the stipendiary magistrate were not intended in any way to prejudice the rehearing by a fresh panel, who would come to their own conclusion.

When the case came on it was attempted in the opening on behalf of the wife to read our judgment, and the justices expressed the view that they wished, or thought they ought, to have an unprejudiced view of the evidence, without the matter being in any way hampered, or assisted, as the case may be, by anything which we had said on the interpretation of the transcript.

We are asked to say that this creates a dangerous precedent, and that it is of vital importance that a public judgment, as a judgment of this court is, should not be concealed artificially from the justices when the matter comes on for rehearing. Now, I think for my part that this is not a matter about which a general pronouncement can be made. I think everything depends upon the nature of the particular case. In the first place, I draw the widest possible distinction between a judgment of this court which points out that the justices have gone wrong in this or that particular as a matter of law, and a judgment in a case which depends solely upon inferences of fact. In cases involving matters of law—and they, of course, form the very great majority

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of the cases in which we do order a rehearing—there can, I think, be no question but that the justices must have the right—indeed, the duty—to see in what respect we think that the first court misdirected themselves in matters of law, so that they may avoid falling into the same pitfall; of that I think there can be no doubt at all. But when a case is purely one of the inferences of fact which are to be drawn from this piece of evidence or that piece of evidence, and the whole thing is simply one of fact, in my opinion the position is different, and I think we should be making nonsense, making a pretence, indeed, of saying, as we did say in this case, and as we habitually say in other cases, that with regard to the inferences of fact we have no wish at all to prejudice the rehearing but are only trying to show sufficient grounds for having ordered a rehearing: we should, I think, be making a pretence of that, and turning it into a mere formula, if we were to force magistrates who wish to form their own view to read what we did in fact say about the various questions of fact.

Now to be a little more particular about this case. It is said that to take this view of the matter puts an impossible burden upon the court, upon counsel and upon advocates generally, because it is impossible to know where the line should be drawn. Well, it is a very long time since it was first said—and the instance I have in mind is one in which it was said by Lord Blackburn—that it may be very difficult to know where to draw the line, but it may be very easy to say of any given case that it is on one side or the other of any line that can reasonably be drawn. I say no more about this case than that it is perfectly easy to say that it stands unquestionably on the side which is one of pure fact and no law, rather than on the side where there is some law but a good deal of fact, and a very, very, long way indeed from a case where the decision to upset the judgment in the first trial depended solely upon a matter or matters of law.

I think that the justices were right in taking the view that they would try the case better if they did not have our judgment read. We have read it very carefully and had it read to us, and I think they were right in that view, but I want to say this by way of caution: if in the course of the hearing any reference is made to any supposed point on which we are alleged to have expressed an opinion, or if any attempt is made to introduce any part of the very full and careful reasoning of the stipendiary magistrate about a question of fact, then in my view the whole thing would be open, and the justices would not only be entitled but would be bound to let in what we said about the case. But

provided the case is tried as it should be, de novo and without reference to inferences which may have been drawn in the past, either by the stipendiary magistrate or by this court on the questions of fact, I think that this judgment should remain where it is. The secret is, I imagine, only known to the clerk of the court, who will be able to ensure that there is fair play all round.

STEVENSON J. I entirely agree, and I only want to add a few words by way of emphasis, lest anyone may in future seek to suggest as a general proposition that judgments of this court should not be revealed to justices who are charged with the task of rehearing a case remitted by this court.

The question at issue in this case is whether or not this husband constructively deserted this wife. In the course of the hearing before the stipendiary magistrate at Hull the husband was not called. The evidence of the husband was in our view essential to the determination of the question which that court had to decide, and it is important to observe that counsel for the husband appearing in this court conceded that there must be a rehearing.

In those circumstances the judgments delivered in this court consist almost entirely of discussion of and comment upon the evidence before the stipendiary magistrate, which are designed to explain or justify the order for the rehearing, which was already a matter of concession.

I have said that in order to emphasise that these judgments consist of comments upon facts, and nothing else.

Now it is the task of the justices who form the panel engaged in rehearing this case to try those very facts, one hopes upon evidence which will be complete, and upon which they will have a full opportunity of making up their own minds.

In those circumstances I think that they were manifestly right not to consider and permit to be read before them the judgments of this court, which are, indeed, qualified by the observation that they are not intended to prejudice the retrial of the issues in this case by the fresh panel of justices.

As my Lord has pointed out, utterly different considerations must arise where a judgment is based on any proposition of law, or any direction upon a matter of law in relation to which the court of trial has gone wrong, because, of course, the justices who have to rehear such a case must always direct themselves with reference to the judgments which have been delivered in this court.

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For these reasons I am quite satisfied that this application must be dismissed.

Direction accordingly.

Solicitors: *Kingsford, Dorman & Co. for Gosschalk, Austin & Wheldon, Hull; Thompson, Cook & Babington, Hull.*

J. B. G.

1958
Oct. 15.

Lord Merriman P. and Hewson J.

JONES *v.* JONES.

Husband and Wife—Maintenance—Justices—Wilful neglect to maintain —Order against husband under section 43 *of the National Assistance Act,* 1948*—Whether wilful neglect can be found if order obeyed —Husband not informed of wife's need for further support—No element of misconduct—Therefore no wilful neglect to maintain— Summary Jurisdiction (Married Women) Act,* 1895 (58 *&* 59 *Vict. c.* 39), *s.* 4*—National Assistance Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 29), *s.* 43.

A husband was ordered to make a weekly payment to his wife under the provisions of section 43 of the National Assistance Act, 1948, and punctually obeyed that order. The wife, whose financial needs were not covered by it, applied for and was granted an order under the provisions of the Married Women (Separation and Maintenance) Acts, 1895 to 1949, on the ground that the husband had wilfully neglected to provide reasonable maintenance for her. Her financial position had, however, never been brought to the notice of the husband. The husband appealed:—

Held, that since the husband was ignorant of his wife's needs he could not be said to have been guilty of a wilful neglect to maintain her, for such neglect imports an element of misconduct.

Stringer v. *Stringer* [1952] P. 171; [1952] 1 T.L.R. 415; [1952] 1 All E.R. 373; *Starkie* v. *Starkie* [1953] 1 W.L.R. 1396; [1953] 2 All E.R. 1255n., 1519; *Pinnick* v. *Pinnick* [1957] 1 W.L.R. 644; [1957] 1 All E.R. 873 applied.

Quaere, whether the punctual payments under the Act of 1948 would of themselves be sufficient to prevent a finding of wilful neglect to maintain.

Morton v. *Morton* [1942] W.N. 43; 58 T.L.R. 158; [1942] 1 All E.R. 273; *Tulip* v. *Tulip* [1951] P. 378; [1951] 1 T.L.R. 1056; [1951] 2 All E.R. 91 considered.

APPEAL by a husband against a decision of the justices for the Welshpool petty sessional division of Montgomeryshire, on June 3,

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1958, who found that he had wilfully neglected to provide reasonable maintenance for his wife, and made an order for £2 a week.

The husband was permanently disabled 100 per cent. as a result of his war service, and permanently confined to a hospital in Cardiff under the control of the Ministry of Pensions. The wife, resident in Welshpool, was on the evidence in a state of considerable need, and she was relieved by the National Assistance Board under the National Assistance Act, 1948. On October 6, 1953, the Welshpool justices had made an order under section 43 of that Act that the sum of £2 17s. 6d. weekly should be paid by the husband to the wife. That sum was paid by stoppage out of his pension of some £9 a week net payable by the Ministry of Pensions. The payments had been made regularly since the order was made. There was no evidence that the husband had been informed of his wife's circumstances since the order of October 1953.

John Perrett for the husband. Neglect to maintain imports some element of matrimonial misconduct: *Jones* v. *Jones*.[1] A husband who is unaware of a change in the wife's circumstances and who is punctually complying with an existing maintenance order cannot be guilty of wilfully neglecting to provide the wife with reasonable maintenance. [*Tulip* v. *Tulip*,[2] *Stringer* v. *Stringer*[3] and *Starkie* v. *Starkie* (*No. 2*)[4] were referred to.]

G. H. Crispin and *D. R. Stuckey* for the wife. The notes of evidence do not indicate that the husband was ignorant of the wife's destitution. The justices were entitled to infer that the husband knew of the wife's plight, especially as officials and various charitable organisations had been concerned in the matter.

[LORD MERRIMAN P. The reasons given by the justices for their decision do not help you. There is no indication that they ever applied their minds to the point.]

LORD MERRIMAN P. stated the facts and continued: It was suggested in the court below that the justices had no jurisdiction to make an order under the Summary Jurisdiction (Married Women) Act, 1895, because of the existence of the order made under the National Assistance Act, 1948. I do not propose to dilate on this point, because it has been abandoned here before

[1] (1930) 46 T.L.R. 33.
[2] [1951] P. 378; [1951] 1 T.L.R. 1056; [1951] 2 All E.R. 91.
[3] [1952] P. 171; [1952] 1 T.L.R. 415; [1952] 1 All E.R. 373.
[4] [1954] 1 W.L.R. 98; [1953] 2 All E.R. 1519.

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us. I merely say this, that there is authority in *Birmingham Union* v. *Timmins* [1] which decides that the existence of an order under the Summary Jurisdiction (Married Women) Act, 1895, did not prevent the guardians from getting an order under the law which prevailed in 1918, corresponding in some respects, but not in all, to the law laid down in the National Assistance Act, 1948. If the point had not been abandoned I should have wished to go into the converse position rather more carefully than we have been able to do on a cursory examination of *Birmingham Union* v. *Timmins*.[1]

That brings me to the real point in this case, and that is that it is suggested that the justices ought not to have found wilful neglect to maintain because of the punctual payments under the order made on October 6, 1953. I think, myself, that that point is not a good point; but I should have been happier about it if I felt that the justices had ever really given their attention to the issues which arise out of the circumstances that this order existed and had been punctually paid. They say in their reasons that they have come to the conclusion that wilful neglect to provide reasonable maintenance was proved because the evidence showed wilful neglect to provide reasonable maintenance, that the complainant was suffering extreme hardship, and "the "evidence shows that though the respondent is unfortunately "completely disabled he is possessed of sufficient means to "maintain the complainant," and "that the weight of the "evidence shows that the respondent being fully maintained "in hospital, without any expense to himself, would not suffer "any hardship in making the payments ordered." I confess that those reasons look to me very much like saying: "The "wife needs the money and the respondent has got it, and there-"fore there is wilful neglect to maintain, and there is wilful "neglect to maintain because he has wilfully neglected to main-"tain her," a state of things about which we spoke rather plainly in *Starkie* v. *Starkie*.[2] The real trouble in this case, in my opinion, is that that really represents what has happened, and the crucial point has not been gone into.

On the authority of the original *Morton* v. *Morton*,[3] which has been followed and approved in the recent case of *Tulip* v. *Tulip*,[4] which deals with the punctual payment of maintenance under an agreement not being conclusive against an allegation of

[1] [1918] 2 K.B. 189.

[2] [1953] 1 W.L.R. 1396; [1953] 2 All E.R. 1255n.

[3] [1942] W.N. 43; 58 T.L.R. 158, 159; [1942] 1 All E.R. 273.

[4] [1951] P. 378.

wilful neglect to provide reasonable maintenance, I am prepared, applying that, to assume that the same principle applies to the punctual payments under this order to which I have referred, although there is, of course, an essential difference between payment under an order of the court and that which is merely payable under some agreement; but I think that the same problem still remains, whether the payment thus made is reasonable; and that leads me to what I think is the essential part of the evidence which is lacking in this case.

It is well settled that punctual payment under an agreement (and I think the same thing applies to punctual payment under an order) is of very strong evidential value that the amount so ordered or so agreed is a reasonable amount; but it is not conclusive. Circumstances may have changed, and it is with regard to a case in which circumstances have changed that what was said by Denning L.J. in *National Assistance Board* v. *Parkes* [5] is so important. He said there, in a couple of short sentences, "The principle of *Tulip* v. *Tulip* [6] applies, I think, just as much "when there is an agreement to pay nothing as when a fixed sum "is to be paid; and it overrides anything said previously in *Baker* "v. *Baker* [7] and *Chapman* v. *Chapman*." [8] Pausing there, I ought to say that at this moment my brother and I have reserved a judgment dealing with the validity of that pronouncement,[9] about which, if I may quote myself and Collingwood J., this court has already said something in *Pinnick* v. *Pinnick*.[10] But we are not concerned here with that part of the case. What is important are the words that follow. Denning L.J. went on [11]: "But so long as the husband is ignorant of the new situation he "is under no such duty, and is not guilty of wilful neglect to "maintain her. That is, I think, the effect of the decision in "*Stringer* v. *Stringer*." [12]

Without going into detail, *Stringer* v. *Stringer* [12] is one of the cases in which the decision of the Court of Appeal in *Chapman* v. *Chapman*,[13] referred to in the sentence I have just read, was followed, and it happens to contain the explanation of how the unreported case of *Chapman* v. *Chapman* [13] came to be decided,

[5] [1955] 2 Q.B. 506, 517; [1955] 3 All E.R. 1.

[6] [1951] P. 378.

[7] [1950] W.N. 29; 66 T.L.R. (Pt. 1) 81.

[8] Unreported (C.A.) April 4, 1951. (Extracts from the judgments are cited in *Stringer* v. *Stringer* [1952] P. 171.)

[9] *Lilley* v. *Lilley* [1958] 3 W.L.R. 728.

[10] [1957] 1 W.L.R. 644; [1957] 1 All E.R. 873.

[11] [1955] 2 Q.B. 506, 517.

[12] [1952] P. 171.

[13] See n. 8.

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and it is perfectly correct to say it is a case in which stress was laid on the point that the husband had not had it brought to his notice that the circumstances had changed since the original parting. But we have looked in vain in the present case for any evidence whatever that at any time the financial plight of this wife, of which details were given to the justices, had ever in any way, directly or indirectly, been brought to the notice of the husband. After all, it was for the wife to prove her case of wilful neglect to provide reasonable maintenance. In the absence of proof of the important facts that her situation had changed for the worse, that the money which was being provided for her under the order of October, 1953, was not sufficient to meet her needs, and that this was brought home to the knowledge of the husband, in my opinion, on the authority of the passage that I have just read, the wife fails. Likewise, on the line of authorities—*Starkie* v. *Starkie* (*No. 2*) [14] is one of them, but there are many others, for example, *Whittaker* v. *Whittaker*,[15] *Diggins* v. *Diggins*,[16] *Jones* v. *Jones*,[17] and others—which have laid down that the element of misconduct is implicit in the words "wilful neglect to provide reasonable maintenance," I think that this wife has failed to prove her case, from whichever point of view one looks at it.

One must recognise, of course, as a matter of realism that this cannot be the end of the story, but we are only concerned with the case as it stands. We have been asked to refer it back to the justices, but I do not think that in the circumstances that is the proper solution. I think that this wife set out to prove this case in a jurisdiction where she was entitled to prove it, but where it was practically impossible for the husband to attend to give evidence, and I think that she having failed to prove her case the order should be set aside, and I propose that that is what should be done.

HEWSON J. I agree with what Lord Merriman P. has just said. I have in mind what counsel said in his address to the court on behalf of the wife, that since two officials had been investigating the matter on behalf of the wife, and on behalf of various charitable organisations, it must be or might be inferred that the husband had been informed of his wife's condition. I can see no substance in that argument at all, because both of those officials were in Welshpool and not in Cardiff, and were only

[14] [1954] 1 W.L.R. 98.
[15] [1939] W.N. 332; 55 T.L.R. 1070; [1939] 3 All E.R. 833.
[16] [1927] P. 88; 43 T.L.R. 37.
[17] (1930) 46 T.L.R. 33.

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Hewson J.

the local representatives in Welshpool. There is not a shred of evidence that the husband in this case was ever informed of his wife's circumstances, or that the wife ever made them known to him. I entirely agree with Lord Merriman P. that this order should be set aside.

Appeal allowed; order set aside.

Solicitors: *Gregory, Rowcliffe & Co. for Harrison & Sons, Welshpool; John Lewis & Woods for Norman Morgan & Davies, Cardiff.*

J. B. G.

MOUNTBATTEN *v.* MOUNTBATTEN.

1958
Oct. 6, 7;
Nov. 24;
Dec. 11.

Davies J.

Husband and Wife—Divorce—Foreign decree—Conflict of jurisdiction—Foreign decree recognized by court of wife's "ordinary residence"—Decree obtained outside the jurisdiction of that court—Parties domiciled in England—Whether decree recognized in England—Collusion—Effect—"Ordinary residence"—Whether determined by founding proceedings on residence in other State—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 18 (1) (*a*) (*b*).

Husband and Wife—Collusion—Foreign decree—Effect on.

Residence—Divorce—"Ordinary residence"—Whether determined by founding proceedings on residence in other State.

A husband and wife were married in 1950 in the United States of America, and they lived together in New York City. The husband retained throughout his English domicile of origin. In December, 1952, he returned to England, and he alleged that the wife refused to follow him. Shortly before he left, he was served with a summons in the Supreme Court of New York issued on behalf of the wife, who there instituted an action for divorce or alternatively separation. Interlocutory orders were made in that action; but proceedings for divorce were later instituted in the State of Chihuahua, Mexico, by the wife after negotiations to that end between the parties through their lawyers. On May 21, 1954, the wife filed a petition for divorce in the Mexican court, alleging incompatibility of temperament, and a decree of dissolution was pronounced on the following day. The wife was present at the hearing and the husband was represented. The New York action was discontinued by consent on June 7, 1954.

The jurisdiction of the Mexican court was based on two grounds: (a) that the wife was resident within that jurisdiction, her physical presence at the moment of the granting of a certificate to that effect being sufficient, and (b) that both parties had expressly submitted to the jurisdiction. Either ground would have been of itself sufficient.

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Expert evidence was accepted that the decree of the Mexican court would be recognized without question in the State of New York, even though divorce proceedings were pending there at the time; and that as a result of that decree the wife thereafter would unquestionably be held in that State to be a single woman.

Apart from her brief visit to Mexico, the wife was ordinarily resident in the State of New York from the marriage in 1950 to the date of the present proceedings.

The husband prayed the court for a declaration that his marriage had been validly dissolved by the Mexican decree, the basis of his submission being as follows: (a) the New York court was the court of the residence of the wife, and she had been more than three years ordinarily resident within its jurisdiction; (b) the New York court would recognize the Mexican decree; (c) the English court would under *Armitage* v. *Attorney-General* [1906] P. 135; 22 T.L.R. 306, recognize the validity of a decree pronounced alibi if such a decree was recognized as valid by the court of the domicile; (d) as a result of recent decisions, the English courts may now recognize foreign decrees pronounced at the suit of a wife if the wife at the time of the presentation of her petition had been three years ordinarily resident within the jurisdiction of the court which pronounced the decree; (e) the court should therefore recognize the Mexican decree by an extension of the principle in *Armitage* v. *Attorney-General* (supra), since it was recognized by the court within whose jurisdiction the wife had resided for three years and whose competence to dissolve the marriage would now be recognized:—

Held, (1) that had the wife been ordinarily resident in the State of New York for three years prior to the institution there of proceedings for divorce, and had a decree been pronounced in those proceedings, the court would have recognized that decree although the jurisdictional test in New York is one year's residence only.

Travers v. *Holley* [1953] P. 246; [1953] 3 W.L.R. 507; [1953] 2 All E.R. 794; *Carr* v. *Carr* [1955] 1 W.L.R. 422; [1955] 2 All E.R. 61; *Arnold* v. *Arnold* [1957] P. 237; [1957] 2 W.L.R. 366; [1957] 1 All E.R. 570; *Robinson-Scott* v. *Robinson-Scott* [1958] P. 71; [1957] 3 W.L.R. 842; [1957] 3 All E.R. 473; *Manning* v. *Manning* [1958] P. 112; [1958] 2 W.L.R. 318; [1958] 1 All E.R. 291; *Gerrard* v. *Gerrard*, The Times, November 18, 1958, applied.

(2) But that the English court would not recognize decrees which were not recognized by the court of the domicile except decrees pronounced by the English court in the exercise of its own statutory jurisdiction and decrees pronounced, as in the cases above, by foreign courts in strictly analogous circumstances. The principle that jurisdiction in divorce depends on domicile is otherwise still paramount; and from the terms of the statutory exceptions it would appear that Parliament expressly recognizes that test of jurisdiction.

Le Mesurier v. *Le Mesurier* [1895] A.C. 517; 11 T.L.R. 481 applied.

(3) That the Mexican decree was accordingly invalid by English

law, for it was not one which would be given direct recognition by the court of the domicile, and it would be a wholly illegitimate extension of the principle of comity, upon which *Travers* v. *Holley* (supra) and the subsequent cases turned, to hold that this decree should be recognized owing to the interposition of a residential qualification of the wife in a third State.

Armitage v. *Attorney-General* [1906] P. 135; 22 T.L.R. 306 distinguished.

Quaere whether the conduct of the wife in going to Mexico and founding proceedings upon her residence there (short though it was) terminated her "ordinary residence" in the State of New York.

Per curiam: Had the Mexican court had jurisdiction to dissolve the marriage, the collusive nature of the proceedings (in which no question of fraud on the Mexican court arose) would not have prevented recognition of the Mexican decree in England.

UNDEFENDED PETITION by husband for a declaration that his marriage had been validly dissolved by a Mexican decree of divorce on May 22, 1954. Proceedings upon a prayer in the alternative for a decree of divorce on the ground of desertion were stayed pending the hearing of the prayer for a declaration.

The following statement of facts is substantially taken from the judgment:

The husband's domicile of origin was English. The parties were married on February 4, 1950, the wife being the divorced wife of one William Simpson. At all material times they lived at 510, Park Avenue, New York City. There were no children. The court was satisfied that, subject always to the effect of the wife's short visit to Mexico in May, 1954 (when she obtained the Mexican divorce), and her actions and declarations there, the wife had continuously lived in New York State from the date of the marriage down to July, 1958. At the date of the marriage the husband was employed in the United States, but he made it plain to his wife that he had no intention of abandoning his domicile of origin.

At the end of 1952 the husband's appointment in the United States was coming to an end and, according to his evidence, he told his wife that he wished her to come and live with him in England, but she refused. On December 11, 1952, in New York, he was served with a summons for separation in an action commenced by the wife in the Supreme Court of New York. His Lordship said that at first he was under the impression that that action was something different from the wife's action for divorce or separation; but it was clear from the bound volume of pleadings in the New York action that those actions were one and the

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same. On December 19, 1952, the husband left New York for England, where he had lived ever since. Since that date he had not seen his wife or had any direct communication with her.

On April 29, 1953, he was served with his wife's complaint in the New York action, in which she alleged cruelty, desertion and adultery and prayed for divorce or, alternatively, separation. Only two paragraphs of that document required specific mention. Paragraph 2 read: "At the time of the commencement of this "action and for more than one year past, the plaintiff has con- "tinually resided at 510, Park Avenue, New York City, New "York." The point of that allegation was that, as the expert on American law, Mr. Crane, said in evidence, the jurisdiction in divorce in the courts of New York depended on one year's residence. Paragraph 36 read as follows: "No decree of divorce "has been obtained by the defendant against the plaintiff in any "of the courts of any State or Territory of the United States, "or in any court of this State of competent jurisdiction, nor has "any other action been brought nor is any pending between the "plaintiff and defendant for the relief demanded herein." That averment no doubt appeared in pursuance of some rule similar to rule 4 (1) (*h*) of the Matrimonial Causes Rules, 1957.

The husband delivered a defence denying all the wife's allegations and cross-praying for a separation on the ground of desertion. The copy of that document was not dated.

On October 15, 1953, an order for alimony pendente lite and what would be called in England security for costs was made. On November 24, 1953, the amount of alimony was reduced on appeal by the Appellate Division of the Supreme Court.

In an affidavit sworn on January 22, 1954, the husband's New York lawyer, Mr. Granville Whittlesey, stated that on behalf of the husband he had approached the wife's lawyers with a view to "an amicable disposition of the entire matter," and he adumbrated a cross-charge of adultery against the wife.

On January 25, 1954, Mr. Edward Bennett, the wife's New York lawyer, swore an affidavit stating that the husband's lawyer had suggested that the wife should discontinue her action in New York and should go to Reno, in the State of Nevada, and commence an action for desertion to which the husband would file an appearance. The underlying suggestion was that such an action would not be defended.

On February 2, 1954, an order was made on the wife's application for the taking of evidence on commission, and also an order giving leave to the husband to amend his defence.

There were no further documents in the bundle of pleadings; but the court was told by Mr. Temple, for the husband, that on June 7, 1954, the New York action was by consent discontinued.

There was no evidence before the court as to what discussions and negotiations went on between the parties through their lawyers. But two most important documents were put in evidence. The first of these, dated April 14, 1954, was a power of attorney given by the husband to one Negrete, a Mexican lawyer. It was executed in London, and one of the attesting witnesses was the husband's London solicitor. It was in Spanish. The English translation was in these terms: "I, David Michael "Mountbatten, of full age, residing in the City of London, "England, British subject, a merchant, in the full exercise of "my civil rights, hereby make known: That I grant a special "power of attorney to licentiate Francisco Alfredo Negrete, a "resident of Ciudad Juarez, State of Chihuahua, Republic of "Mexico, to represent me before the courts of the said State of "Chihuahua in legal proceedings for divorce which have been or "are about to be brought against me by my wife, Romaine Pierce "Mountbatten née Simpson, until recently a resident of the City, "County and State of New York, and for this purpose I authorize "the said advocate to continue the action throughout all its "stages until a final decision is given; to appear on my behalf, "and ratify and confirm the petition, since incompatibility of "temperament actually exists between my wife and myself, "dispute and lodge objections, submit proofs, including that of "admission, make and answer interrogatories, renounce in my "name and for this special purpose the jurisdiction of my "domicile, and expressly to submit me to the jurisdiction of the "said courts in accordance with articles 22, 23 and 24 of the law "of divorce in the State of Chihuahua; to receive notifications, "appear at hearings of every kind; to challenge with or without "cause, judges, magistrates and other officials of justice; to inter-"vene in all legal appeals and to withdraw therefrom; including "injunction; execute agreements and make stipulations which in "his judgment may be expedient; to substitute this power of "attorney and revoke substitutions, reserving to himself at all "times the exercise thereof; and finally I grant him such powers "as may be necessary to fulfil the special objects of these "presents, by which I ratify and confirm all and every one of the "acts which my attorney may carry out and also those done by "persons appointed as substitutes. This power of attorney is

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" signed by me before a notary public and witnesses who sign in " the City of London, England, today April 14, 1954."

It was therefore plain that Mr. Negrete was being given by Lord Milford Haven complete power, in the undefended divorce suit that Lady Milford Haven was going to start in Mexico, to make every admission, to submit to the jurisdiction and to do everything to facilitate the obtaining of a divorce by the wife.

The court said that there was one phrase that perhaps needed a little explanation: " to receive notifications." The point of that was that, as was explained by Mr. Valls (the expert on Mexican law), the time for appeal from such a decree as was eventually pronounced by the courts of Mexico was the somewhat surprisingly short time of 24 hours from notification, and " notification " meant, if the parties were present or represented in court, the actual pronouncing of the decree. However strange it might appear to English lawyers, it seemed clear that in Mexican law there was nothing objectionable in a document such as this power of attorney. Indeed, according to the evidence of Mr. Valls, such a document appeared to be welcomed by the Mexican courts as tending to facilitate the speedy dispatch of judicial business. (His Lordship added that it was, nevertheless, somewhat surprising that the husband's London solicitor had been prepared to associate himself with such a venture.)

The second document was signed in New York on May 15, 1954, by the wife, and on May 14, 1954, on behalf of the husband, by his attorney, Granville Whittlesey, his New York lawyer, mentioned above. It provided by clause 1 that " each party may " reside from time to time at such place, and conduct, carry on, " and engage in such employment, business, or profession as " either shall desire, without any control, interest or rights, " restraint or interference, direct or indirect, by the other party " hereto." Clause 2 provided for the payment by the husband to the wife of the sum of 10,000 dollars in full and complete discharge of the husband's obligations past and future for the support and maintenance of the wife. There were a number of other provisions regarding property, and clause 6 provided as follows: " In the event that either of the parties shall hereafter " prosecute an action for absolute divorce against the other in any " court, this agreement shall be presented to the court as con- " stituting the voluntary and complete settlement between the " parties of property rights and all claims for support and " maintenance of the wife, and either party may request the court " to incorporate this agreement in so far as it makes provision for

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" the support of the wife in any decree or judgment which it shall " render, and neither party will request nor consent to any decree " or judgment as to the maintenance and support of the wife " other than as herein provided, and this agreement shall not merge " in any such judgment or decree but shall survive." (The collusive nature of such documents is considered in the judgment.)

The evidence as to the obtaining of the Mexican decree was derived entirely from the decree itself and the explanation of it given by Mr. Valls. There were two translations into English of the decree (which was in Spanish), and these differed somewhat from each other. But their effect appeared to be the same. The material parts of the decree were as follows: " Citizen Rodolfo " Silva, secretary to the First Court in Civil Matters of the " District of Bravos, State of Chihuahua, Mexican Republic, " certifies that in the proceedings for necessary divorce brought " by Romaine Pierce Mountbatten née Simpson against David " Michael Mountbatten, a decree was issued in the following " terms: Decree.—City of Juarez, Chihuahua, on May 22, 1954. " Whereas to give a final decision in the proceedings for necessary " divorce brought by Romaine Pierce Mountbatten née Simpson " against David Michael Mountbatten." (There was a reference to a case number.) " And whereas: By petition dated in this " City the twenty-first day of the present month and year " Romaine Pierce Mountbatten née Simpson, stating that she " is a resident thereof as appears from the certificate granted to " her by the Municipal Presidency which is annexed to her said " petition, and furthermore submitting herself to the jurisdiction " of the court, instituted proceedings for necessary divorce " against her husband David Michael Mountbatten alleging incompatibility of temperament between the two of them " as grounds therefor, and declaring: That the marriage was " contracted on February 4, 1950, in the District of Columbia, " United States of North America, as appears from the respective " certificate of marriage which was enclosed, together with its " translation into Spanish owing to its being drawn up in English. " That there are no children of the said marriage. Romaine Pierce " Mountbatten née Simpson also added in her petition that " regarding the property, rights and obligations of her marriage, " her husband David Michael Mountbatten and herself had " entered into an extrajudicial contract by mutual agreement, " for which reason she does not consider it necessary to produce " the same to the court. The petition was accepted, the respective notification being ordered to be given to the respondent

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" David Michael Mountbatten, and the petitioner Romaine Pierce " Mountbatten née Simpson having appeared personally before " the undersigned judge to submit her petition, she was notified " of the decision accepting the same and she stated: That she " ratifies her petition in every respect including what is stated " as to her express submission which she makes to the jurisdiction " of this court and produced the certificate of her registration " in the municipal registry of residents of this City, and by " notification dated the day of the date hereof the licentiate " Francisco Alfredo Negrete as legal attorney of the respondent " replied on his behalf to the petition lodged against him, " admitting it in every respect and submitting expressly to the " jurisdiction of this court, applying furthermore for the decision " which is now being given in view of the fact that all the legal " requirements have been complied with, including payment for " the publication of the same; and whereas this court is com- " petent to hear and give a decision on the present case according " to what is stipulated in articles 22, 23 and 24 of the divorce " law, by virtue of the fact that the petitioner Romaine Pierce " Mountbatten née Simpson proved, by the certificate from the " municipal president's office which she produced, that she has " the necessary residential qualification for instituting proceedings " and appeared and ratified her petition before the undersigned " judge, lastly submitting herself expressly to the jurisdiction " thereof, and in accordance with what is stipulated by article 28 " of the said law, the certificate of marriage of the parties, together " with its translation into Spanish, was enclosed. As grounds for " divorce, the petitioner put forward incompatibility of tempera- " ment, being a reason allowed by section XIX of article 3 of the " aforesaid divorce law; and on a claim being admitted in every " respect it is considered to be fully proved according to article 370 " of the Code of Civil Procedure; subsidiarily: As it is stated in " the petition that there are no children of the marriage and " that regarding the property, rights and obligations arising from " the marriage they had entered into an extrajudicial contract " by mutual agreement, no decision may be given in this decree " in respect of those aspects. Wherefore and by virtue, further- " more, of " (and then certain articles are recited) " it is decreed: " First: The marriage entered into by David Michael Mount- " batten with Romaine Pierce Mountbatten née Simpson on the " 4th February 1950 in the District of Columbia, United States " of North America, is declared dissolved with all the legal conse- " quences thereof, both parties being legally entitled to enter into

"another marriage. Second: The petitioner is authorized to "reassume her maiden name. Third: Let the present decision "be registered, let it be published, let the certified copies that "may be applied for be issued to the parties concerned and in "due course let the documents in the proceedings be placed "among the records. Giving a final decision, thus citizen licen- "tiate Fernando Romero Figueroa, First Judge in civil matters "of the district of Bravos decreed and signs." There were then various signatures.

From that document it appeared that the wife's petition was filed on May 21, 1954, in the Mexican court. (His Lordship observed in his judgment that it was, perhaps, odd that the New York lawyers did not—either on the ground of expediency or out of courtesy to their own court—arrange for the New York action to be discontinued before the Mexican proceedings were started.) The petition was based upon incompatibility of temperament and was accompanied by a certificate from the Municipal Presidency that the wife was a resident of Ciudad Juarez, and the wife submitted herself to the jurisdiction of the court. She appeared personally in court. It was not clear whether she appeared personally in court both on May 21 and 22, 1954; but it seemed probable that it was only on the latter day—what we should call the day of the hearing. The husband was represented by Negrete, who admitted the contents of the petition and submitted expressly to the jurisdiction of the court. On May 22, 1954, the decree of dissolution was made.

That decree was accepted, according to the evidence of Mr. Valls, as conclusive proof by Mexican law of a valid decree of divorce. Mr. Crane stated that in his opinion a divorce obtained in such circumstances would be accepted without question in the State of New York, and that in his opinion Lady Milford Haven would at the date of these proceedings unquestionably be held by the New York court to be a single woman. Mr. Crane's opinions were not challenged by the Queen's Proctor, who called no evidence to the contrary.

*R. J. A. Temple Q.C.** and *Colin Duncan* for the husband. This is a prayer for a declaration which concerns the status of the parties and on which the evidence of the experts proves the validity of the Mexican decree granted to the wife both by

* Mr. Temple was not the leading counsel advising the husband at the time of the Mexican divorce and was only instructed on his behalf much later. EDITOR.

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Mexican law and by the law of the State of New York. If systems of law more liberal than ours have to be considered, that in itself should be no obstacle. This is a question of recognition and not a question of jurisdiction; but the rules are inter-related inasmuch as developments in municipal jurisdictional rules are reflected in recognition rules. The jurisdictional rules of English municipal law, and our own recognition rules of Private International Law, have pursued a parallel development; both are of recent date, and the recognition rules are wholly case law and declaratory of the common law.

Our jurisdictional rule is mostly to be found in the cases, with statutory grafts. As a matter of history it can be shown that domicile has no very firm grip on either rule. It is not sufficient to dispose of the impact which statutes have made on the common law merely to dismiss them as exceptions. Prior to 1857 divorce a vinculo was obtained by Act of Parliament: the Act of 1857 contained no jurisdictional requirement, and until 1895 matrimonial residence as the qualification was supreme. The case of *Le Mesurier* v. *Le Mesurier* [1] in 1895 was a jurisdictional, not a recognition case; and even when the question of domicile was then supposedly settled, cases of hardship resulted in exceptions to the rule of domicile: see *Ogden* v. *Ogden* (*or Philip*) [2]; *Stathatos* v. *Stathatos* [3]; *de Montaigu* v. *de Montaigu*.[4]

The Indian Divorce Act, 1869, proceeded on a residential qualification for persons domiciled in England, and decrees granted under that Act had extraterritorial validity until *Keyes* v. *Keyes and Gray* [5] (see *Phillips* v. *Batho* [6]). The Indian Divorces (Validity) Act, 1922, had then to be passed to validate decrees granted on the residential basis, and the present position is regularised by the Colonial and Other Territories Jurisdiction Acts, 1925 to 1950. [He referred also to the Matrimonial Causes (Dominion Troops) Act, 1919, and the Matrimonial Causes (War Marriages) Act, 1944.]

It was established in *Wall* v. *Wall* [7] that the effect of section 8 of the Act of 1937 was to give the court jurisdiction to grant decrees of presumption of death and dissolution of marriage to a petitioner without restriction on the period of residence and without any qualification of domicile: this was the position until

[1] [1895] A.C. 517; 11 T.L.R. 481.
[2] [1908] P. 46; 24 T.L.R. 94.
[3] [1913] P. 46; 29 T.L.R. 54.
[4] [1913] P. 154; 29 T.L.R. 654.
[5] [1921] P. 204; 37 T.L.R. 499.
[6] [1913] 3 K.B. 25; 29 T.L.R. 600.
[7] [1950] P. 112; 65 T.L.R. 731; [1949] 1 All E.R. 927.

the passing of the Law Reform (Miscellaneous Provisions) Act, 1949, shortly afterwards. [He referred also to *Deacock* v. *Deacock*.[8]]

Such being the jurisdictional rule, the recognition rule is to be found in *Shaw* v. *Gould*.[9] The case itself does not make any suggestion of reciprocity, and was decided upon the lack of Scots domicile. It is submitted that, in so far as the decision is based upon the supposed application of a jus gentium, it is erroneous in its approach. Continental developments based on the Code Napoleon, and those systems based on a personal law of religion, were ignored, and domicile was not in fact in 1868 a universal jurisdictional requirement.

Nowadays there is no similarity between the recognition rule and the municipal jurisdictional rules upon which the foreign decree was based. We merely test, by one of two of our municipal requirements (i.e., domicile), the validity of decrees which in form, method, procedure and jurisdiction are wholly unknown to our law, as in *Har-Shefi* v. *Har-Shefi* (*No. 2*).[10] The recognition or conflict of law rules in the absence of legislation are part of the common law, and statutory developments in the jurisdictional sphere must be taken into account when the inquiry concerns the recognition rule. All the statutory municipal changes in regard to residence ought to be regarded as modifying and affecting not only the jurisdictional but also the recognition rule. This is what really underlies the decision in *Travers* v. *Holley*.[11] These modifications for an additional jurisdiction are now represented by section 18 of the Matrimonial Causes Act, 1950.

It is essential to keep in mind that the question here concerns a divorce granted to a wife. Whether her decree be obtained in England or abroad, English law no longer applies the single test of domicile when considering the validity of a wife's decree. In each case her domicile, English or foreign, may be wholly disregarded. In the case of a foreign decree obtained by a wife domiciled in England within the forum of her residence the following proposition is submitted to be correct:

If facts exist which would enable a court in England to exercise jurisdiction under section 18 of the Act of 1950, then the decree of a foreign court within whose jurisdiction the wife was

[8] [1958] P. 230; [1958] 3 W.L.R. 191; [1958] 2 All E.R. 633.

[9] (1868) L.R. 3 H.L. 55.

[10] [1953] P. 220; [1953] 3 W.L.R. 200; [1953] 2 All E.R. 373.

[11] [1953] P. 246; [1953] 3 W.L.R. 507; [1953] 2 All E.R. 794.

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in fact resident for three years immediately preceding the commencement of her proceedings will be recognised in this country notwithstanding (1) that the foreign court takes jurisdiction on a basis which English law does not adopt, and (2) that the grounds of the decree would afford no relief by English law: *Robinson-Scott* v. *Robinson-Scott* [12]; *Arnold* v. *Arnold* [13]; *Manning* v. *Manning* [14]; *Gerrard* v. *Gerrard*.[15] The development is from a case where law and fact are similar (*Travers* v. *Holley* [16]) to a case where factual residence is the common factor (*Robinson-Scott* v. *Robinson-Scott* [17]).

The test by the law of the domicile was not limited to the case of a foreign decree granted in the court of the domicile, but was the appropriate test for the recognition of a decree granted to a wife outside the forum of the domicile, to which jurisdiction the spouses were jointly solely amenable. The recognition question propounded was, first, as to the proper law to apply, and, since the answer was the law of the domicile, the expanded recognition question became this: Is the decree valid by the law of the place where, by English law, jurisdiction solely rests to dissolve the marriage on the wife's application? See *Armitage* v. *Attorney-General* (*Gillig cited*), *Gillig* v. *Gillig* [18]; *Cass* v. *Cass* (*orse. Pfaff*) [19]; *Clark* v. *Clark* [20]; *Wyllie* v. *Martin* [21]; *Owen* v. *Robinson*.[22]

The domicile test was put forward because of the view that parties were solely amenable in matters of status to the law of the domicile. In 1906 we neither admitted nor claimed any additional jurisdiction for wives, and we declared that our single principle (now discarded) would avoid the scandal of persons being married in one jurisdiction and divorced in another: *Wilson* v. *Wilson*,[23] cited in *Le Mesurier* v. *Le Mesurier*.[24] English law, whilst maintaining that the wife during coverture retains her husband's domicile, has relaxed its own municipal requirements to decree dissolution of marriage in the case of a wife. It has enacted, applied and reciprocally recognized that a wife wherever domiciled enjoys a freedom of choice at will to confer on a law district a jurisdiction or right to dissolve her marriage. She does

[12] [1958] P. 71; [1957] 3 W.L.R. 842; [1957] 3 All E.R. 473.
[13] [1957] P. 237; [1957] 2 W.L.R. 366; [1957] 1 All E.R. 570.
[14] [1958] P. 112; [1958] 2 W.L.R. 318; [1958] 1 All E.R. 291.
[15] The Times, November 18, 1958.
[16] [1953] P. 246.
[17] [1958] P. 71.
[18] [1906] P. 135; 22 T.L.R. 306.
[19] (1910) 26 T.L.R. 305.
[20] (1921) 37 T.L.R. 815.
[21] (1931) 44 B.C.R. 486.
[22] [1925] N.Z.L.R. 391.
[23] (1872) L.R. 2 P. & M. 435, 442.
[24] [1895] A.C. 517, 540.

this, by English law, by residence within the forum of her choice of a substantial character, but nevertheless concurrently with the retention of her right to have recourse to the court of her domicile if she chooses.

English law thus recognizes two districts wherein may be found jurisdiction to dissolve a marriage on the wife's application. We permit both to offer a concurrent availability and we recognize that the wife can compel the husband to litigate in the forum of her choice away from the courts of his domicile. For this purpose we have equated the court of her residence with the court of her domicile; and so little regard have we for the power of the court of the domicile that for a foreign domiciled wife, prima facie qualified by mere residence here, we refuse to stay her suit pending litigation in the court of her domicile: *Sealey (orse. Callan)* v. *Callan.*[25] Further, we do violence to the law of the domicile of those countries where dissolution of marriage is unknown, for a residence qualification in England is available to the wives of persons whose husbands are domiciled in countries such as Eire, Spain, Italy and the Argentine. The position of a wife proceeding here on a residential basis is illustrated by section 18 (3) of the Matrimonial Causes Act, 1950, which provides that "the issues shall be determined in accordance with "the law which would be applicable thereto if both parties were "domiciled in England."

We should therefore be prepared to concede in the case of a foreign law district, where the English domiciled wife was factually able to proceed after three years' residence, that the proper law to be applied to the issues, and to the recognition of a decree which would be valid by the law of that district—whether obtained within or without the forum—is as if the parties were in fact domiciled there. Unless equation is conceded, it would appear that we could not claim more than municipal validity for our own decrees based on residence. In that event we would be increasing the area of conflict which our policy has always been to restrict. It would be lamentable if the courts are granting two lines of dissolution of marriage.

[DAVIES J. But these people went off to Mexico. What do you say to that?]

It is submitted that that question is not relevant to the issue here, and may I say that it is not advice which I personally would have given. But having regard to the development of

[25] [1953] P. 135; [1953] 2 W.L.R. 910; [1953] 1 All E.R. 942.

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our law qua decrees granted to wives, it is submitted that the doctrine of *Armitage* v. *Attorney-General*[26] should be applied to cases where the wife proceeds outside those jurisdictions in which by English law she is concurrently qualified to proceed. The expanded recognition question ought therefore to be a dual question reflecting her twofold capacity for choice of forum; it may be put as follows: "Is the decree valid by the law of either "of the places where jurisdiction lies to dissolve the marriage, "and to which, at the option of the wife, the spouses are amen-"able?"—i.e., is the decree good by the law of the domicile, in this case English law, or is it good by the law of the State of New York? This dual question arises because the recognition rule should reflect the municipal jurisdictional rules, and these rules now recognize that the spouses are amenable either to the law of the domicile or of the wife's three years' residence. The aim of the court ought, it is submitted, to be to lessen the area of conflict, and the status of the wife, as accepted in the State of New York, should be recognized if possible.

It is, accordingly, submitted:

(1) That since on the expert evidence the decree is good by the law of Chihuahua, it would, accordingly, be recognized by the law of the State of New York.

(2) That *Armitage* v. *Attorney-General*[27] has been expanded and modified in the case of a wife because of the equation, in her case, of domicile and residence, and that, accordingly, the decree is one which should now, on that authority, be recognized as good by English law. If the parties had been domiciled in New York no question could have arisen upon the validity of the Chihuahua proceedings. The wife stepped outside the forum of her residence as she might have stepped from the forum of her domicile. If we are prepared to recognize the jurisdiction of the State of New York upon a residential qualification, then we may recognize this decree, which is valid in New York, upon the basis that both parties were amenable to the law of that State, as would unquestionably have been the case had the wife continued in that State the proceedings she had initiated there. If the proper rule for recognition refers us in the present case to the country of residence where the wife by English law was competent to proceed at her election, that is, the State of New York, the recognition of the Chihuahua decree does not depend on any reciprocity or on any similarity between our own municipal law and that of Chihuahua. The recognition of the decree in

[26] [1906] P. 135. [27] Ibid.

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Armitage v. *Attorney-General* [28] did not depend on any similarity between the laws of South Dakota and England: it was recognized because the foreign law of the State of New York, which was the law of the domicile, recognized the decree.

(3) It is further submitted that the decree should be recognized on the direct application of the law of the State of New York, based upon the theory of equated domicile. Concurrent amenability to the tribunals of that State should validate not only decrees obtained in the forum itself; it should lead to the recognition of decrees of a third country which are recognized by that State. If recognition by us in such circumstances involves any concession to that State, we should not, in view of the importance of status, hesitate to make it, and our municipal interest should give way to the international importance of the question. Recognition of such a decree does not trench upon our interests, since we readily abandon an English domiciled wife to the courts of any country in which she has been "ordinarily "resident" for three years. It adds nothing to the question if she in fact obtains a decree elsewhere, instead of a decree granted in the courts of that country, if that decree is in fact valid by the law of that country. Such a development is wholly consistent with the law for wives which we ourselves recognize and apply. It would surely be arbitrary to contend that domicile is the sole test for the Chihuahua decree, on the ground that domicile is the only jurisdictional basis. If comity demands a recognition of the extraterritorial effect of the operation of the foreign municipal law, acting within its own courts, should a wife call it into operation directly, it is nonetheless deserving of recognition in its indirect application, once it has been equated to the forum domicilii.

The single test of domicile was formerly applied because that forum alone was considered capable of dealing with status with an extraterritorial effect. That is so no longer. Cessat ratione, cessat ipsa lex.

Roger Ormrod Q.C. and *A. T. Hoolahan* for the Queen's Proctor. To succeed, the petitioner must establish that domicile has gone as a test of jurisdiction and that residence is now the test. In this case both the husband by his attorney and the wife made fictitious submissions to the court in Mexico, intending that they should immediately thereafter become divorced spouses in their own respective countries, regardless of the law of their domicile.

[28] [1906] P. 135.

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Parliament did not legislate, either before or upon the enactment of the Matrimonial Causes Act, 1857, to dissolve the marriage of anyone who was not domiciled in England. The principle that domicile was the basis of the jurisdiction of the English courts to grant divorce was established in *Shaw* v. *Gould*,[29] and in subsequent decisions the English courts refused to tolerate people who were domiciled in England going to courts outside the jurisdiction to obtain a divorce to which, for one reason or another, they were not entitled in this country. *Levett* v. *Levett and Smith*[30] recently showed that that principle is still pre-eminent. And although to a very limited extent we have relaxed this principle in regard to wives, the whole trend of English law remains firmly against the recognition of decrees which have been pronounced by courts to which one or both spouses have resorted merely in order to have their marriages dissolved. English law has gone no further than to introduce certain exceptions to the general principle in order to relieve cases of unnecessary hardship.

The Indian Divorce Act, 1869, was for some time thought to give the Indian courts jurisdiction to dissolve the marriages of persons domiciled in England although resident in India, but that view was shown to be erroneous in *Keyes* v. *Keyes and Gray*,[31] and in order to validate such divorces which had previously been granted in those courts to persons domiciled in England it was necessary to pass a special Act, namely, the Indian Divorces (Validity) Act, 1921, in which by implication Parliament recognized that there was no jurisdiction in divorce outside the courts of the domicile. It is indeed fundamental to the Indian and Colonial Divorce Jurisdiction Act, 1926, as is shown, for example, by section 1 (1) (*d*) of the Act,[32] that the proper court to dissolve a marriage is the court of the domicile, and that Parliament had merely delegated to certain courts in India and the Colonies a jurisdiction to grant divorces to persons domiciled in England, but resident abroad, in order to relieve cases of hardship. It is further submitted that both the Matrimonial

[29] L.R. 3 H.L. 55.

[30] [1957] P. 156; [1957] 2 W.L.R. 484; [1957] 1 All E.R. 720.

[31] [1921] P. 204.

[32] Indian and Colonial Divorce Jurisdiction Act, 1926, s. 1 (1) (*d*): "any such court [i.e., one having "jurisdiction abroad under the Act] "may refuse to entertain a petition "in such a case if the petitioner is "unable to show that by reason of "official duty, poverty or any other "sufficient cause, he or she is pre-"vented from taking proceedings in "the court of the country in which "he or she is domiciled, and the court "shall so refuse if it is not satisfied "that in the interests of justice it "is desirable that the suit should be "determined in India."

Causes (Dominion Troops) Act, 1919, and the Matrimonial Causes (War Marriages) Act, 1944, reaffirmed the principle that the fundamental test was domicile by expressly providing, as in section 1 (1) (*a*) of the Act of 1944, that the court should have jurisdiction "as if both parties were at all material times domiciled in England."

Although the courts at one time appeared to have accepted, as in *Ogden* v. *Ogden*,[33] *Stathatos* v. *Stathatos*[34] and *de Montaigu* v. *de Montaigu*,[35] that there might be exceptions to the rule of domicile, those cases have been disapproved in cases such as *H.* v. *H.*[36] and *Travers* v. *Holley*,[37] and are no longer, it is submitted, good law.

The principle in *Armitage* v. *Attorney-General*[38] is accepted as a logical extension of that in *Le Mesurier* v. *Le Mesurier*[39]; but to accept the argument on behalf of the husband that the principle in *Armitage* v. *Attorney-General*,[40] whereby our courts will recognize a foreign decree if that decree is recognized by the court of the domicile, should be extended to a recognition of a decree obtained by a wife outside the courts of her residence provided that the latter courts recognized the decree as valid (although those courts were not the courts of her domicile) would be not to extend, but to overturn, the principle in *Armitage*,[40] for the Mexican decree in this case is admittedly bad by the law of the parties' domicile.

It may, indeed, be open to argument that our attitude to the recognition of foreign decrees ought not to be affected by the fact that we have assumed jurisdiction in the case of wives who have been ordinarily resident in this country for three years. It is not easy, it is submitted, to reconcile the decision in *Travers* v. *Holley*[41] with the principles laid down by the Privy Council in *Le Mesurier* v. *Le Mesurier*,[42] and it is desired to reserve the question whether *Travers* v. *Holley*[43] was rightly decided. Alternatively, *Dunne* v. *Saban*[44] may show that the true test of the applicability of the doctrine of reciprocity is the precise jurisdictional requirement of the foreign court, and that the English court should confine the principle of recognition to the decrees of courts which exercise a jurisdiction on qualifications substantially

[33] [1908] P. 46.
[34] [1913] P. 46.
[35] [1913] P. 154.
[36] [1928] P. 206; 44 T.L.R. 711.
[37] [1953] P. 246, 256.
[38] [1906] P. 135.
[39] [1895] A.C. 517.
[40] [1906] P. 135.
[41] [1953] P. 246.
[42] [1895] A.C. 517.
[43] [1953] P. 246.
[44] [1955] P. 178; [1954] 3 W.L.R. 980; [1954] 3 All E.R. 586.

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similar to those required in England. It is, therefore, submitted that *Arnold* v. *Arnold* [45] and *Robinson-Scott* v. *Robinson-Scott* [46] may have been wrongly decided. Applying this submission to the facts of the present case, we would not recognize a decree obtained by a wife in the State of New York, even if she had in fact been ordinarily resident there for the relevant period of three years, for the courts of that State in fact claim jurisdiction to dissolve a marriage in the event of a residence of only one year.

The doctrine of reciprocity does not help the husband in this case. For if a wife, domiciled in Eire and ordinarily resident in England for over three years, were to obtain a decree of divorce in Chihuahua, such a decree would not be recognized by our courts.

It would seem, indeed, impossible to conceive of circumstances in which our courts would recognize a decree of divorce obtained in Chihuahua by a wife not domiciled or ordinarily resident for at least three years in Mexico. Even if the submission on behalf of the husband as to the equation of residence and domicile were correct, it would have to be established that the wife had been ordinarily resident in the State of New York for the three relevant years, yet the moment that she attempted to set up her residence in Chihuahua, this would be inconsistent with her claim to be ordinarily resident in New York. *Stransky* v. *Stransky*,[47] for example, was a case where the wife was only out of the jurisdiction for a temporary purpose, and not one in which she had actively asserted a contradictory residence. The wife here cannot, it is submitted, be heard to assert that she was resident in both forums; and by her claim to residence within the jurisdiction of Chihuahua, which must in the context of divorce be deemed a solemn act, she must be held to have abandoned, upon the Mexican proceedings, her previous "ordinary" residence in the State of New York.

Assuming, however, that the Mexican decree was valid by the law of the State of New York; assuming, further, that the principle in *Armitage* v. *Attorney-General* [48] can legitimately be extended to enable an English court to recognize such a decree as valid, the question of public policy must remain. First, where should the line of demarcation be drawn between those decrees which our courts may properly recognize and those which they may not? The courts in the United States have drawn the line

[45] [1957] P. 237.
[46] [1958] P. 71.
[47] [1954] P. 428; [1954] 3 W.L.R. 123; [1954] 2 All E.R. 536.
[48] [1906] P. 135.

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against "mail-order" decrees. *Shaw* v. *Gould*[49] points to a more practical test. If what is done is a mere resort to a foreign jurisdiction in order to obtain a divorce which cannot be obtained in the courts of the domicile, such a decree ought not to be recognized by English law. The husband's case here is based, initially, upon the recognition of the decree by the courts of New York. That recognition, however, depended upon his submission to the jurisdiction of the Mexican court. It is contended that the effect, in England, of that submission, which involved a collusive co-operation between the parties in purporting to oust the jurisdiction of this court, and in obtaining the decree, is contrary to the principles of the English divorce laws, and that it would therefore be contrary to public policy for our courts to recognize a decree obtained in such a manner.

Temple in reply. It is not accurate to suggest that the argument on behalf of the husband is that "domicile has gone "and residence has come." This is a special case, and the contention is that for wives domicile has been joined by residence; that there is a dual jurisdictional basis; and that residence of nature and quality as we require it is equated with domicile. The husband's case does not rest on comity. Where, as here, it is submitted that the validity, for example, of a Chihuahua decree derives from the interposition of the law of the State of New York, reciprocity does not enter into the question. This is a case of the "foreign law" theory of private international law, and the only question in that event is how the foreign court deals with the matter. The only task for this court is to apply the law which the foreign court would apply. The contention here is for an expansion, not a reversal, of the law in *Armitage* v. *Attorney-General*.[50] If, as is contended, English law incorporates the rule in *Armitage*[50] as expanded, that law itself should recognize the Chihuahua decree through the interposition of the law of the State of New York.

The proposition might be startling, but the recent legislation has produced cases equally startling and of almost insuperable difficulty, which must sooner or later be faced. The wife is free to marry in New York, but not here. It is lamentable that the right to submit that *Travers* v. *Holley*[51] was wrongly decided has been reserved on behalf of the Queen's Proctor, especially for those who have remarried on the faith of the extraterritorial validity of decrees based on residence.

[49] L.R. 3 H.L. 55.
[50] [1906] P. 135.
[51] [1953] P. 246.

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The argument that for wives the court of the domicile is paramount to dissolve a marriage, or to decide whether it has been dissolved, creates absurd and insoluble situations in our own municipal law. A decree absolute, based for jurisdiction on residence, and granted to a wife domiciled in Eire, cannot by English law result in the wife becoming the widow of the respondent spouse upon his subsequent death; but by the law of Eire the marriage has remained in being. Were the respondent to die intestate leaving property in England, a conflict would arise as to the destination of his assets, since English law would apply the law of the intestate's domicile. The question, therefore, whether the "wife" had or had not become a "widow" would, accordingly, involve a conflict of our own rules. Problems of this nature illustrate the fact that domicile for wives is not paramount; and similar cases must arise in any country where dissolution may be unknown to the law, or where an English decree based on residence has no effect outside this country.

Collusion, in our sense of the word, in relation to the manner in which the parties resorted to Chihuahua is irrelevant in such a case as this: *Bater* v. *Bater* (*orse. Lowe*)[52]; *Crowe* v. *Crowe*.[53] The merits of the parties are equally irrelevant, and so is the question of public policy. But if public policy should be relevant, then the status of the wife should be recognized in conformity with the recognition accorded by the State of New York and the South American republics, for inconvenience and confusion must arise if the decree is not recognized in England. The real cause of the problem arises from the statute itself.

If it is necessary to show that the wife was "ordinarily "resident" within the meaning of section 18 (1) (*b*) of the Act of 1950, there is no evidence to show that she ever intended to make her home other than in New York, and her "ordinary resi- "dence" there was never interrupted: *Stransky* v. *Stransky*.[54] The marriage was in February 1950, the New York action for divorce began in April 1953, and throughout this period the wife was ordinarily resident in New York. Had she obtained a decree in those proceedings, we would have recognized it. But in any event the Mexican requirement qua residence was mere physical presence, which is not inconsistent with a continued "ordinary "residence" in New York.

Finally, when marriages in this country were dissolved by Acts of Parliament, the domicile of the husband could in fact be

[52] [1906] P. 209; 22 T.L.R. 408.
[53] [1937] 2 All E.R. 723.
[54] [1954] P. 428.

other than in England: cf. *Sinclair's Divorce Bill*,[55] which further shows that where domicile could otherwise have been an obstacle, it might have been disregarded.

Cur. adv. vult.

DAVIES J. reading his judgment, said: This is a husband's petition dated January 15, 1958, and filed on January 16, 1958. It is undefended. By it the petitioner prays in the first instance for a declaration that the marriage celebrated between the parties on February 4, 1950, at the National Presbyterian Church, in the District of Columbia, United States of America, was validly dissolved on May 22, 1954, by a decree of the First Civil Court of the District of Bravos, sitting at Ciudad Juarez, in the State of Chihuahua in the Republic of Mexico. Alternatively, the petitioner prays for a decree of dissolution on the ground of desertion, asking for the exercise of the discretion of the court in respect of his own adultery.

By an order dated July 15, 1958, proceedings on that part of the prayer which asks for dissolution were stayed pending the hearing of the cause on the prayer for the above-mentioned declaration.

On October 6, 1958, the suit came on for hearing, and it immediately became apparent that it involved an important point of law, such as would be difficult for the court to determine without a presentation of both sides of the case. I, therefore, indicated that I should send the papers to Her Majesty's Proctor in order that he might be represented. Meanwhile, Mr. Temple for the petitioner continued his opening of the case and called his witnesses, the petitioner, Mr. Valls, an expert on Mexican law, and Mr. Crane, an expert on New York law.

The hearing was then adjourned and was resumed on November 24, 1958, when the Queen's Proctor appeared by counsel.

Whenever in this judgment the expressions "husband" or "wife" are used, that is merely for convenience and is, of course, entirely without prejudice to the petitioner's contention that at the date of this petition the parties had ceased to be husband and wife. Again, whenever reference is made to Mexico, Mexican law, Mexican court, Mexican decree or divorce, this means, unless by the context it otherwise appears, the State of Chihuahua, the law of that State, the court which applies that law, and the decree or divorce pronounced by such court.

[His Lordship then stated the facts substantially as set out

[55] [1897] A.C. 469.

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above, saying of the documents dated April 14, 1954, and May 15, 1954:] Those two documents make it plain, in my judgment, that the petition which the wife in a matter of days after the execution of the second of them presented in the Mexican court was, according to our notions, wholly collusive. In saying that, I wish to make it clear that there is no suggestion that there was any fraud on the Mexican court. What I mean is that the petition was presented in Mexico as a result of a bargain made between the parties that the wife should do so on the basis of a financial settlement between them and upon the understanding that the husband would not defend. It is right that it should be categorically stated, in fairness to both husband and wife, that it is clear that whatever they did they did with the advice and assistance throughout of their lawyers, American, Mexican and English.

It is contended by Mr. Ormrod on behalf of the Queen's Proctor that this finding of collusion is a material matter for consideration in deciding whether the Mexican decree is entitled to recognition in this court. But, in my opinion, that submission is not correct. There is abundant authority for the proposition that if the decree of a foreign court is otherwise entitled to recognition, the fact that the law and practice of the foreign court is different from ours does not matter, save, possibly, if it can be shown to be contrary to natural justice. Moreover, it is important that one should not allow one's instinctive dislike and disapproval of a transaction of this sort to affect the consideration of the point of law which arises in this case. I do not pause to consider what, if any, effect the agreement between the parties for a divorce and the provisions of clause 1 of the document executed in May, 1954, would have upon the allegation that thereafter the wife was in desertion of the husband. That question is not now before the court, and, in any case, the written document is by its express terms to be construed and interpreted according to the laws of the State of New York.

[After considering the material parts of the Mexican decree as set out above, his Lordship continued:] This decree, according to Mr. Valls' evidence, which, of course, I accept, is by Mexican law conclusive proof of a decree of divorce. It is recognized all over Mexico, and, by the Treaty of Monte Video of 1889, in Bolivia, Paraguay, Peru and Uruguay. It is final unless appealed from within 24 hours from notification. Notification in the present case was the reading of the decree in court, both parties being represented. Jurisdiction was based on two grounds, either

of which would have been of itself sufficient. The first ground was the residence of the wife as certified by the municipal registry: astonishingly enough, according to our ideas, residence connoted nothing more than mere physical presence at the moment of the granting of the certificate. The second ground was that both parties expressly submitted to the jurisdiction. It may be observed, incidentally, that Mexican law in terms contemplates divorce by mutual consent.

The only remaining question of fact is as to the law of the State of New York, that is to say, whether the courts of that State are prepared to recognize decrees, such as the one in question, granted by the courts of Chihuahua as validly dissolving the marriage of persons resident in the State of New York. The evidence of Mr. Crane on this point was quite definite. "The "question has come up on a great many occasions," he said. "It is perfectly clear and I think beyond question of doubt that "a divorce in the State of Chihuahua where one party to the suit "there appears in person, irrespective of how long, and the other "party appears by counsel—as I understand the case to be here "—will be accepted without question in the State of New York "as a matter of comity."

He supported this view by reference to three decided cases: *Leviton* v. *Leviton*,[1] *Caswell* v. *Caswell*[2] and *Fricke* v. *Bechtold*.[3]

The *Leviton* case[1] was heard in the New York Supreme Court in 1938 before McCook J. His judgment is in these terms: "In "this action for divorce by a woman against her husband the "amended complaint makes the following allegations: The parties "were married in London, England, July 17, 1934, being at that "time residents of the State of New York; between August 1, "1936, and the commencement of the action the defendant "committed adultery with a woman calling herself defendant's "wife (not the plaintiff); the defendant, after a bigamous re-"marriage, has lived and is living in adulterous intercourse with "that woman in New York, California and other states. "Plaintiff asks that the bonds of marriage be dissolved and that "reasonable provision for her support be made. The answer "interposes four defences. In the first it sets forth that: The "Civil Court of First Instance of the Bravos District at the City "of Juarez, State of Chihuahua, Republic of Mexico, was a court

[1] (1938) 6 N.Y.Supp. 2nd series, 535.

[2] (1952) 111 N.Y.Supp. 2nd series, 875.

[3] (1957) 168 N.Y.Supp. 2nd series, 199.

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" of general jurisdiction over divorce and dissolution of marriage; " on August 6, 1935, the plaintiff instituted a divorce action " against the defendant in that court; in her petition the plaintiff " attached a residence certificate dated August 6, 1935, issued " by the Mayor's office of the City of Juarez, stating that her " name was inscribed in the municipal register of residents of " that city, and a certificate to the same effect containing the " defendant's name was also attached; defendant was personally " served with process in that city; he appeared by attorney, sub- " mitted himself to the jurisdiction of that court and filed an " answer; on August 6, 1935, both parties were in Juarez and " appeared personally before the court; the law of Mexico " applicable to the action provides that in ' mutual consent ' cases " the residence is fixed by the residence of either party and is " proven by the certificate of the municipal registry; on August 6, " 1935, the court rendered judgment in favour of the plaintiff, " a copy of the judgment being annexed to the answer; the " judgment recited, among other things, that the domicile of the " parties and the cause of action had been proven and that the " competency of the court to adjudge had been properly estab- " lished; on August 6, 1935, the judgment was duly filed and " recorded."

It will be seen, therefore, that, in essence, that case is the same as this, save that in that case both parties were in Mexico and that apparently that decree was obtained in one day, whereas in this case it took two days, or, at any rate, 24 hours.

" The second defence sets forth that, in reliance upon the " Mexican divorce and induced by it, the defendant, remarried " and the plaintiff recognized defendant's remarriage, herself " contracted to remarry, and is estopped from questioning the " validity of defendant's remarriage. The third defence alleges " that the adultery, if any, was committed with the plaintiff's " consent, procurement, etc. The fourth defence sets forth that " the defendant was legally remarried after a lawful and valid " Mexican divorce, and that plaintiff by her act in procuring " that divorce induced the remarriage and recognized it, fully " condoning and forgiving the defendant.

" All four defences depend upon the Mexican divorce of " August 6, 1935.

" The answer nowhere alleges that at the time of the " institution of the Mexican divorce action the parties in fact " either resided or were domiciled in Mexico.

" The general principles of law with respect to foreign divorces

" are clear and have been stated frequently by the courts of the " state. This case, however, presents a novel situation, and " neither counsel has adduced controlling authority. The deci- " sions cited by plaintiff, chiefly relating to constructive or other " defective appearance in foreign divorce actions, are clearly " distinguishable.

" (1) Moral, ethical or social considerations, when embodied in " the declared public policy of this state, undoubtedly permit our " courts on appropriate occasion to refuse recognition of divorces " granted by other jurisdictions. The Federal Constitution does " not forbid such refusal. On the other hand, New York courts " customarily give full recognition to divorces granted in other " states and countries even where the ground, the domicile, or " other prerequisites, singly or together, are found to be such that " they would be held insufficient towards securing a New York " decree after a trial taking place here. The ultimate question " raised by the first defence is, therefore, whether our public " policy justifies departure, in this case, from the general rule.

" (2, 3) The so-called mail-order divorces, Mexican and other- " wise, have been held invalid. Careful scrutiny is always applied " to judgments without personal appearance by the defendant. " In any collateral attack, however, our court ordinarily will " not question the result where both parties have appeared and " where on the face of the decree is presented clear evidence " of jurisdiction over them by the court which rendered the " judgment.

" (4, 5) On this motion there can be no dispute that all the " acts enumerated in the first defence actually were performed. " The circumstance that they transpired within twenty-four hours " of one another is not in and of itself sufficient to upset the " decree. Upon the face of the complaint now under discussion " we may discover an element of suspicion through the simul- " taneous occurrence of so many material events. That is, how- " ever, answered and overcome by our duty to recognize the " jurisdiction of the Mexican court, established by the appearance " of both parties before it. The Mexican law respecting residence " has been followed. The establishment of a domicile or residence " in the strict sense is a question both of intent and act. The " parties acted; we must accept the Mexican court's conclusion " upon their intent.

" An illustration from one of our sister states: The period now " required in Nevada is even shorter than previously, but the " abridgement does not prevent us from recognizing residence, nor

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" can it lead to an inference of no jurisdiction in the Nevada court. " We may disagree with the law of Mexico or Nevada establishing " rules for residence. We may even disapprove them as express- " ing theories repugnant to our own standards, as applied to " corresponding litigation initiated within this state. It does not " follow that we should disturb a decree entered either in Nevada " or Mexico if it complies with the requirements of their statutes, " for we then say that the court had jurisdiction of the subject- " matter and the parties, and thus was competent to act."

It may be (and I speak with the utmost deference upon a matter of which, of course, I have no knowledge at all) that there is a distinction, or there might be a distinction, between the attitude of the New York courts to decrees of other states of the Union and those of foreign states. For the " full faith and " credit " clause of the Constitution may be material with regard to the former, whereas, of course, it cannot apply to the latter.

I do not think I need read any more of the judgment. The grounds on which it proceeded and its reasoning are perfectly plain and clear from the extract that I have already read.

The only other New York case to which I need refer is *Fricke* v. *Bechtold*,[4] the last one on this point. It is very short. The judge (Rabin J.) says: " Although the plaintiff aided and abetted " the defendant to obtain her Mexican decree, and indeed financed " the entire project, that factor does not bar him from attacking " the Mexican decree. Nevertheless such decree, grounded as it " was upon the personal appearance of the defendant in the " divorce granting court and the filing of a notice of appearance " by her first husband through an attorney designated by him, is " entitled to recognition under the doctrine of comity." Then a number of authorities are cited by the judge.

It is plain from the citations in the latter case that there is a considerable body of authority to the same effect.

Mr. Crane added that in his opinion Lady Milford Haven would at the present time unquestionably be held by the New York court to be a single woman.

He also dealt in his evidence with another point which was troubling me a little—namely, whether the attitude of the New York courts to the recognition of the Mexican decree would be in any way affected by the fact that at the date of that decree there was already pending in the New York court a suit between the same parties for dissolution. Mr. Crane's evidence on this point starts in this way. I asked, " Is there any reference

[4] 168 N.Y.Supp. 2nd series, 199.

"to the previous proceedings which Lady Milford Haven "had previously commenced in New York?" Mr. Temple said, "I do not think so, but I will make certain. I do "not think she did. Mr. Crane, would the recognition of the "Mexican decree be affected in any way by the fact that the wife "had commenced proceedings in the courts of New York? (A) I "do not think so, sir. I cannot see why. (Q) The fact that she "called the machinery of the State into operation based on her "residence there, would that in any way affect the validity, by "New York law, of her Mexican decree? (A) No, sir." Then I asked a question: "Arising out of your last answer, Mr. Crane, "you have told me about these other cases: supposing this case "now by Lord Milford Haven, instead of being in the English "court, were, in more or less parallel circumstances, before a "New York court and the New York judge had before him the "fact that in December, 1952, apparently the wife there com-"menced some proceedings—the precise nature of which I do not "know" (but I have made this clear now in my judgment) "but it is said to have been for a separation, that in April of "1953 she commenced proceedings for a dissolution or, alterna-"tively, for a separation, and that that suit had been proceeding "happily with a lot of interlocutory proceedings for some twelve "months until February, 1954, and then she went off to Mexico: "would not the American judge say, 'But now, when a New "'York court is seized with this matter, what did she go off "'to Mexico for?'? (A) I would say this, my Lord. The "New York court—the New York judge might not be all that "pleased about it, but I feel quite certain, on the basis of the "cases I have produced, that they would do nothing about it "whatsoever. It is entirely my feeling. I think this stems "back to a concept of American law, which is the ability of the "female party to a marriage to adopt any residence or domicile "she pleases for the purpose of obtaining a divorce—which is a "very old principle of American law."

Mr. Crane was unable to produce any authority in support of this view. But the Queen's Proctor did not call any evidence to the contrary and expressed no wish to cross-examine Mr. Crane. I feel, therefore, that I am bound to find that the New York courts would recognize as validly dissolving the marriage of these parties the decree obtained in Mexico by the wife.

On these facts, then, it is possible to state the question of law which arises for decision in the present case. The submission for the husband is as follows:

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(1) The New York court is the court of the residence of the wife.

(2) The New York court would recognize the Mexican decree.

(3) While formerly our courts took the view that the court of the domicile of the parties was the only court which had jurisdiction to dissolve their marriage, nevertheless we would recognize the validity of a decree pronounced alibi if such a decree was recognized as valid by the court of the domicile (*Armitage* v. *Attorney-General* [5] (*Gillig cited*), *Gillig* v. *Gillig*).

(4) As a result of the decisions in *Travers* v. *Holley*,[6] *Carr* v. *Carr*,[7] *Arnold* v. *Arnold*,[8] *Robinson-Scott* v. *Robinson-Scott*,[9] *Manning* v. *Manning* [10] and *Gerrard* v. *Gerrard*,[11] the English courts now recognize foreign decrees pronounced at the suit of the wife if the wife at the time of the presentation of her petition had been for three years resident within the jurisdiction of the court which pronounced the decree, even though the jurisdictional test of the foreign court is other than that of three years residence and the ground of the decree was not a ground upon which this court could act.

(5) Therefore, this court by an extension of the principle of *Armitage* v. *Attorney-General*,[12] should in the present case recognize the Mexican decree, since it is recognized by the court in whose jurisdiction the wife has resided for three years and whose competence to dissolve the marriage we would now recognize.

It is important, before considering those submissions and the arguments by which they are supported, to premise two fundamental matters. In the first place, it is freely admitted by Mr. Temple for the husband—as, indeed, he has to admit—that, if the question before this court were whether this court would give direct recognition to a Mexican decree granted to one of two parties domiciled in England and there were no question of the interposition of the jurisdiction of the New York court or of any residential qualification of the wife in that jurisdiction, this court would certainly not recognize the decree. Secondly, it is expressly conceded in this case that in our law Lady Milford Haven never at any time after the marriage had or preserved a New York domicile, and that at all material times her domicile was English. Whether the contrary could have been successfully

[5] [1906] P. 135.
[6] [1953] P. 246.
[7] [1955] 1 W.L.R. 422; [1955] 2 All E.R. 61.
[8] [1957] P. 237.
[9] [1958] P. 71.
[10] [1958] P. 112.
[11] The Times, November 18, 1958.
[12] [1906] P. 135.

argued, I do not know. But that point is fundamental to the consideration of the present case.

The approach by Mr. Temple to the problem involved was first of all to examine the history of the doctrine of domicile as the test of the jurisdiction of our own courts, and thereafter to consider to what extent a change in the application of that doctrine has affected the attitude of our courts towards the recognition of foreign decrees.

Domicile as the test of jurisdiction, as is rightly pointed out, depends in the first instance on case law. Not even down to the present Matrimonial Causes Act, 1950, is it expressly enacted by statute that the jurisdiction of this court to dissolve a marriage depends on the domicile of the parties. But it is plain that, at any rate from 1895 and the decision of the Privy Council in *Le Mesurier* v. *Le Mesurier*,[13] the doctrine was really beyond dispute. And it would serve no purpose to cite any of the other authorities on the point.

It is not necessary to consider the apparent breach of this rule made by *Stathatos* v. *Stathatos* [14] and *de Montaigu* v. *de Montaigu*,[15] following a dictum of Sir Gorell Barnes P. in *Ogden* v. *Ogden* (or *Philip*).[16] For those decisions are now discredited. (See *Attorney-General for Alberta* v. *Cook*,[17] *H.* v. *H.*,[18] *Herd* v. *Herd*,[19] and see *Travers* v. *Holley*, *per* Hodson L.J.[20])

The law on this subject apart from statute is conveniently and succinctly summarized by Lord Merrivale P. in *H.* v. *H.*[21]: "... under [English] law [I substitute 'English' for 'British'] "the jurisdiction to decree divorce depends on domicile; that the "domicile of the husband determines the domicile of the wife; "and that independent authority to decree divorce cannot, con- "sistently with English law, co-exist at the same time in two "sovereign States."

The history of the Indian Divorce Act, 1869, an Act of the Indian legislature, is an interesting example of the omnipotence of this principle. That Act, in effect, purported to empower the High Courts of India to grant divorces to Christians resident in India if the marriage had been celebrated in India or the matrimonial offence had been committed there. In *Keyes* v. *Keyes and Gray* [22] it was held that that Indian Act did not empower

[13] [1895] A.C. 517.
[14] [1913] P. 46.
[15] [1913] P. 154.
[16] [1908] P. 46, 82, 83.
[17] [1926] A.C. 444; 42 T.L.R. 317.
[18] [1928] P. 206.
[19] [1936] P. 205; 52 T.L.R. 709; [1936] 2 All E.R. 1516.
[20] [1953] P. 246, 255, 256.
[21] [1928] P. 206, 212.
[22] [1921] P. 204.

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the Indian courts to grant divorces to persons not domiciled in India. In order to remedy the serious situation which then arose owing to the invalidation of divorces pronounced by the Indian courts, there was passed by Parliament the Indian Divorce (Validity) Act, 1921 (11 & 12 Geo. 5, c. 18). This provides as follows: "Any decree granted under the Act of the Indian Legislature known as the Indian Divorce Act, 1869, and confirmed or made absolute under the provisions of that Act, for the dissolution of a marriage the parties to which were at the time of the commencement of the proceedings domiciled in the United Kingdom, and any order made by the court in relation to any such decree, shall, if the proceedings were commenced before the passing of this Act, be as valid, and be deemed always to have been as valid, in all respects, as though the parties to the marriage had been domiciled in India."

As I see it, the legislature is there giving express recognition to the principle that the criterion of jurisdiction is domicile and is legalizing an exception to it.

By the Indian and Colonial Divorce Jurisdiction Acts, 1926 and 1940, a limited jurisdiction was given by the Imperial Parliament to the courts of India to dissolve marriages of parties domiciled in the United Kingdom as if they were domiciled in India. The underlying principle is obviously the same. It is interesting to note that by the Indian Independence Act, 1947, this jurisdiction—delegated to the Indian courts by the earlier Acts—was expressly taken away upon the creation of the two independent Dominions of India and Pakistan.

The next matter to which Mr. Temple referred, going back in order of date, was the Matrimonial Causes (Dominion Troops) Act, 1919 (9 & 10 Geo. 5, c. 28). That Act so far as material provides: "Where a marriage has been contracted in the United Kingdom during the present war by a member of His Majesty's Forces domiciled in any of His Majesty's possessions or protectorates to which this Act applies, the competent court in that part of the United Kingdom where the marriage took place shall, any question of domicile or residence notwithstanding, have full jurisdiction and power to entertain, hear and determine any of the matrimonial proceedings specified in the Schedule to this Act, where such proceedings are instituted by either party to the marriage, and to make decrees and orders in relation to such proceedings, as though the parties to the marriage were domiciled or (where the jurisdiction of the court depends upon residence) resident in that part of the United

"Kingdom." "Residence," of course, refers to such things as judicial separation. "Provided that this Act shall not apply in "any case where the parties to the marriage have at any time "since the marriage resided together in the country of the "husband's domicile."

Here, again, is special legislation to deal with a special situation, and the phrases "any question of domicile or residence "notwithstanding" and "as though the parties were domiciled "or (where the jurisdiction of the court depends on residence) "resident in that part of the United Kingdom," are a clear recognition by the legislature that in general jurisdiction in divorce depends on domicile. It is also to be noted that it is provided that the Act shall not apply if the parties at any time since marriage resided together in the country of the husband's domicile.

In my opinion, no great assistance is to be derived from a consideration of section 8 of the Matrimonial Causes Act, 1937, now replaced by section 16 of the Act of 1950, and the decision of Pearce J. thereunder in *Wall* v. *Wall*.[23] In effect, Pearce J. held that on a petition for dissolution and presumption of death it would be absurd to attach any weight to the domicile of the husband who ex hypothesi was supposed to be dead and that the residence of the wife was sufficient (see *Deacock* v. *Deacock*[24]). That section was added to by section 1 (3) of the Law Reform (Miscellaneous Provisions) Act, 1949. "In proceedings under subsection (1) of section 8 of the Matri- "monial Causes Act, 1937 (which enables the court to make "a decree of presumption of death and dissolution of marriage) "the court shall have jurisdiction in the following cases only, "that is to say—(*a*) in any proceedings, if the petitioner is "domiciled in England; (*b*) in proceedings by the wife, if she "is resident in England and has been ordinarily resident there "for a period of three years immediately preceding the com- "mencement of the proceedings; and in determining for the "purposes of this subsection whether a woman is domiciled in "England, her husband shall be treated as having died im- "mediately after the last occasion on which she knew or had "reason to believe him to be living."

One sees there again that domicile is brought in and that a wife is given an alternative qualification of three years' ordinary residence.

[23] [1950] P. 112.

[24] [1958] P. 230.

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The relevant statutory provision is now section 16 of the 1950 Act: "Any married person who alleges that reasonable "grounds exist for supposing that the other party to the "marriage is dead may, if he is domiciled in England, present "a petition to the court to have it presumed that the other "party is dead and to have the marriage dissolved, and the "court, if satisfied that such reasonable grounds exist, may "make a decree of presumption of death and of dissolution of "the marriage."

There in the current Act, therefore, the test of domicile for the exercise of this particular jurisdiction is the basic one, though the alternative qualification for a wife of three years' ordinary residence is preserved by section 18 (2).

The Matrimonial Causes (War Marriages) Act, 1944, was passed to deal with special cases of hardship similar to those covered by the Matrimonial Causes (Dominion Troops) Act, 1919. It applied to marriages during the war by women domiciled in England to men domiciled outside the United Kingdom. It did not apply to any case where the parties at any time after the marriage had resided in the country of the husband's domicile. What it did was to provide that in the case of marriages to which the Act applied this court should have jurisdiction as though both parties were domiciled in England. Here again it appears that Parliament is expressly recognizing that the test of jurisdiction is domicile.

The last and most important of the statutory provisions in the history of this matter is the present section 18 (1) of the 1950 Act. Section 18 (1) (*a*) replaces section 13 of the Matrimonial Causes Act, 1937, which was the actual section discussed in *Travers* v. *Holley*,[25] and section 18 (1) (*b*) replaces section 1 (1) of the Law Reform (Miscellaneous Provisions) Act, 1949. "Without prejudice to any jurisdiction exercisable by the court "apart from this section, the court shall by virtue of this section "have jurisdiction to entertain proceedings by a wife in any of "the following cases, notwithstanding that the husband is not "domiciled in England, that is to say:—(*a*) in the case of any "proceedings under this Act other than proceedings for pre-"sumption of death and dissolution of marriage, if the wife has "been deserted by her husband, or the husband has been de-"ported from the United Kingdom under any law for the time "being in force relating to the deportation of aliens, and the "husband was immediately before the desertion or deportation

[25] [1953] P. 246.

"domiciled in England; (*b*) in the case of proceedings for "divorce or nullity of marriage, if the wife is resident in "England and has been ordinarily resident there for a period "of three years immediately preceding the commencement of "the proceedings, and the husband is not domiciled in any "other part of the United Kingdom or in the Channel Islands "or the Isle of Man." Subsection (2) has nothing to do with this point. Subsection (3): "In any proceedings in which the "court has jurisdiction by virtue of this section, the issues "shall be determined in accordance with the law which would be "applicable thereto if both parties were domiciled in England "at the time of the proceedings."

It is apparent that the two paragraphs of section 18 (1) deal with different cases. (a) deals with the case of the wife of a man domiciled here who deserts her or is deported; it allows her to take proceedings here despite any subsequent change of domicile by the husband. The provision, as it were, notionally preserves for her her English domicile for the purpose of taking proceedings. (b) is, of course, far wider. It allows a wife to take proceedings here, whatever her domicile, if she has been ordinarily resident here for three years, provided that the husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or Isle of Man.

It is, as I think, important to note the provisions of section 18 (3), which seem to indicate that these special provisions are exceptions to the general rule and that apart from express statutory provisions the principle and the law of domicile are still paramount.

It is submitted by the husband that for wives the jurisdictional basis in our law has been expanded and that for them we have equated three years' residence with domicile. A wife, it is said, in our law retains all her rights in the court of her domicile and has in addition a parallel and concurrent right to proceed in the courts of the place where she has resided for three years. To the extent to which our law so provides, that is undoubtedly true. But I venture to repeat what I said in *Dunne* v. *Saban*[26] (which, of course, was a recognition case, not a jurisdiction case): "It seems to me that the statutory "exceptions to the law regarding domicile as being the test of "the jurisdiction to dissolve a marriage are exceptions and that "the rule, apart from these exceptions, remains in full force."

The same view was expressed by Hodson L.J. in *Levett* v

[26] [1955] P. 178, 190.

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Levett and Smith [27] (another recognition case) where he said that the position in this country is that domicile is the foundation of jurisdiction and that there are exceptions to the rule.

What then is the effect of these statutory alterations of the jurisdiction of our own courts upon the principles upon which we recognize foreign decrees and upon the question whether in the present case we should recognize the decree of the Mexican court as being good in law here? It must be remembered that the decree was not pronounced by the court of the wife's domicile nor by the court of a place in which she had resided for three years or at all, unless one is to accept the technical residence in the Mexican sense for, it seems, something like 24 hours. The claim for recognition, I repeat, is based upon the fact that the decree is recognized by the court in the jurisdiction of which it is said that the wife had been resident or ordinarily resident for three years.

There is no doubt that, in general, our courts have for many years refused to recognize the decrees of any foreign court other than those of the court of the domicile of the parties. It is not necessary to do more than refer to the decision of the House of Lords in *Shaw* v. *Gould*,[28] and in particular to the speech of Lord Westbury.[29] Since that date the current of high authority has been constant. It is argued that this rule was based on a wrong view of foreign law and a misunderstanding of the jus gentium. Whether that contention be right or wrong—and I am far from saying that it is right—it is, in my opinion, far too late in the day to ask any court in this country to depart from this well-established principle.

But it is said that there is an exception to this rule. The exception which is relied upon in the present case is that based upon *Armitage* v. *Attorney-General*.[30] The usual statement of the effect of the decision in that case may conveniently be taken from volume 7 of Halsbury's Laws of England, 3rd ed., title "Conflict of Laws," at p. 114: "The English courts will recognize as having extra-territorial validity any decree of divorce "which is also recognized as valid by the courts of the country "of the domicile, whether those courts have themselves pronounced the decree or not." It is doubtful, however, whether the actual decision in that case justifies so wide a proposition, as to which an interesting discussion by one of the gentlemen who gave expert evidence on American law in the case is to be found

[27] [1957] P. 156, 161.
[28] (1868) L.R. 3 H.L. 55.
[29] Ibid. 80–88.
[30] [1906] P. 135.

in volume 17 of the Transactions of the Grotius Society, at pp. 131–134.

The headnote in *Armitage* v. *Attorney-General* [30] is as follows: "The courts of this country will recognize the binding effect of a "decree of divorce obtained in a State where the husband was "not domiciled, if the courts of the country or State of his "domicile would recognize the validity of the decree. G., an "American citizen temporarily resident and carrying on business "in England, but who never abandoned his domicile of origin in "the State of New York, married an Englishwoman in England. "She afterwards instituted proceedings under the Guardianship "of Infants Act, 1886, which were compromised by a deed of "separation. Some years later she instituted, in the State of "South Dakota, proceedings for a divorce, to which he put in an "answer and cross-claim, the latter being dismissed, and a decree "being pronounced on the wife's petition, upon a ground which "would not constitute a ground for dissolving the marriage either "in the courts of the husband's domicile or in this country. "Upon evidence which satisfied this court that the courts of the "husband's domicile would recognize a decree so obtained:— "*Held*, that the South Dakota decree of divorce must be recog-"nized as a valid dissolution of the marriage, and that the "subsequent marriages of the respective spouses were conse-"quently valid."

Before turning to the judgment of Sir Gorell Barnes P., it is important to note an express finding of fact by him.[31] I will read from the second paragraph: "She [the wife] finally determined "to break with this country and to restart her life in America. "In proceeding thither she had in her mind the idea that she "might take proceedings there for a divorce from her husband, "Mr. Gillig; but she had absolutely determined to quit this "country and to establish herself in America. She proceeded to "Yankton, in the State of South Dakota, and one of her objects "in doing so was to institute proceedings there for divorce. She "acquired a domicile there in a sense which is recognized in "America, but is foreign to our notions in this country. Accord-"ing to the evidence of Mr. John Arthur Barratt, if a woman is "separated from her husband under circumstances which would "have given her a cause of action against him she may acquire "a separate domicile."

Sir Gorell Barnes P. also said [32]: "The only question that "remains for consideration is this question of English law: Are

[30] [1906] P. 135. [31] Ibid. 137. [32] Ibid. 141.

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" we to recognize in this country the binding effect of a decree " obtained in a State in which the husband is not domiciled if the " courts of the State in which he is domiciled recognize the " validity of that decree? This point has not been distinctly " determined in the courts of this country." Then Sir Gorell Barnes P. refers to *Harvey* v. *Farnie*,[33] and proceeds: " The " evidence, in the present case, shows that in the State of New " York the decision of the court of South Dakota would be recog- " nized as valid. The point then is: Are we in this country to " recognize the validity of a divorce which is recognized as valid " by the law of the domicile? In my view, this question must be " answered in the affirmative. It seems to me impossible to come " to any other conclusion, because the status is affected and " determined by the decree that is recognized in the State of New " York—the State of the domicile—as having affected and " determined it."

In view of the express finding of fact by Sir Gorell Barnes P. that the wife there had by New York law, the law of the domicile, acquired a domicile in South Dakota, it seems that perhaps a more accurate statement of the effect of that case would be that our courts will recognize a decree of divorce which is recognized as valid by the court of the husband's domicile as having been pronounced by a court in the jurisdiction of which the wife had obtained a separate domicile. But despite this, it is right, in my opinion, that as a judge of first instance I ought to act upon the interpretation of *Armitage* v. *Attorney-General* [34] which has been current and accepted for the last 50 years.

The next step in the argument for the husband is, of course, to show that the rule in *Armitage* v. *Attorney-General* [34] must now be taken to necessitate the recognition by our courts of a decree recognized as valid by the courts of the jurisdiction within which the wife had resided for three years at the date of the petition or suit, even though the decree was pronounced not by that court but by a third court in which she could not, in our law, be said to have been domiciled or resident.

That proposition is based upon the decision in *Travers* v. *Holley* [35] and the cases subsequent thereto upon the question of recognition of foreign decrees. It is right that I should mention that Mr. Ormrod expressly desires to keep open for future argument in the appropriate place the question whether *Travers* v. *Holley* [35] was rightly decided. It is pointed out that the

[33] (1882) 8 App.Cas. 43.
[34] [1906] P. 135.
[35] [1953] P. 246.

decision to the opposite effect by Lord Strachan, in *Warden* v. *Warden*,[36] was apparently not cited to the Court of Appeal in *Travers* v. *Holley*.[35] It is also to be observed that in *Fenton* v. *Fenton*[37] the Full Court of Victoria (which normally follows the English Court of Appeal), after a review of the earlier cases, expressly refused to follow *Travers* v. *Holley*[38] (see in particular the judgment of O'Bryan J.[39]). But *Travers* v. *Holley*[40] is, of course, binding upon this court.

It is, I suppose, correct to say that the subsequent cases of *Arnold* v. *Arnold*,[41] *Robinson-Scott* v. *Robinson-Scott*,[42] *Manning* v. *Manning*,[43] and *Gerrard* v. *Gerrard*,[44] which undoubtedly extended the doctrine of *Travers* v. *Holley*,[45] are not strictly binding upon me. But it is plainly desirable, in my opinion, that I should accept and follow these decisions unless and until they are disapproved of by higher authority. And I propose to do so.

There is one other matter which should be mentioned before turning to those cases. Mr. Temple concedes that it is essential to the success of his argument that it should be shown that Lady Milford Haven was ordinarily resident in New York for the three years immediately preceding the commencement of her suit for divorce in Mexico. In view of the fact that she obtained for the purpose of taking proceedings in Mexico a certificate that she was resident there, even though the conception of residence in Mexican law is so different from ours, it seems to me to be most doubtful whether it can be said that at that moment she retained her New York ordinary residence. Accidental or casual breaks in a period of ordinary residence—for example, breaks for the purpose of business or holiday, such as were discussed in *Stransky* v. *Stransky*[46]—are an entirely different matter. Here we have a case of a woman who quite deliberately, with the knowledge and consent of her husband, left the place where she was ordinarily resident, went abroad and obtained a certificate of residence in a foreign country in order to give jurisdiction to the courts of that country. I do not think it necessary for the purpose of this judgment to express any final opinion on this point, but I have the gravest doubts about it.

[35] [1953] P. 246.
[36] 1951 S.C. 508.
[37] [1957] V.L.R. 17.
[38] [1953] P. 246.
[39] [1957] V.L.R. 17, 33.
[40] [1953] P. 246.
[41] [1957] P. 237.
[42] [1958] P. 71.
[43] [1958] P. 112.
[44] The Times, November 18, 1958.
[45] [1953] P. 246.
[46] [1954] P. 428.

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I will read the headnote of *Travers* v. *Holley*[47]: "A husband "and wife, shortly after their marriage in the United Kingdom "in 1937, went out to Sydney, New South Wales, taking with "them all their belongings, the husband believing that the "Commonwealth offered him better prospects. He invested "money in a business in Sydney which, however, collapsed on "the outbreak of war. For a time he worked on a sheep farm "in northern New South Wales, leaving the wife in Sydney, "where a child had been born in 1938. Later, the husband "obtained a commission in the Australian forces, and subse-"quently transferred to the British forces.

"In August, 1943, the wife, alleging that she had been "deserted since August, 1940, filed a petition for divorce in the "Supreme Court of New South Wales, and was granted a decree "which was made absolute on November 13, 1944. The husband "was served with notice of the petition, but did not defend it, "and both husband and wife later remarried. In 1952 the "husband, whose second marriage had not proved to be satis-"factory, obtained a decree of divorce in the present action on "the ground that the Australian decree was invalid because at the "time it was granted neither husband nor wife was domiciled in "New South Wales, and the wife, by remarrying, had been "guilty of adultery. The wife appealed:

"Held (Jenkins L.J. dissenting) that the husband had "acquired a domicile of choice in New South Wales, and the "appeal should be allowed. It was therefore unnecessary to "decide whether the conduct of the husband in not defending the "wife's petition was conduct conducive to the wife's remarriage "and alleged adultery.

"Held, further (per totam curiam) that the courts of New "South Wales by section 16 (a) of the New South Wales Matri-"monial Causes Act, No. 14, 1899, and the English courts by "section 13 of the Matrimonial Causes Act, 1937, claimed the "same jurisdiction, and it would be contrary to principle and "inconsistent with comity if the courts of this county refused to "recognize a jurisdiction which mutatis mutandis they claimed "for themselves; and that even if, while in desertion, the hus-"band had reverted to his English domicile of origin the New "South Wales court would not be deprived of jurisdiction."

Of course, the only point in that case that concerns this judgment is whether or not, if the foreign statute gives relief to a wife or allows a wife to present a petition in exactly parallel

[47] [1953] P. 246.

circumstances or almost exactly parallel circumstances to those in which a wife is entitled to proceed here, although that court is not the court of the domicile, a decree pronounced by it is entitled to recognition here.

The all important question was dealt with very shortly by Somervell L.J.[48] and it was dealt with equally shortly by Jenkins L.J.[49] But Hodson L.J. discussed the matter in some detail, and I now turn to his judgment.[50] After reciting the existing law as to domicile being the test for recognition, he then refers to section 13 of the 1937 Act, the Matrimonial Causes (War Marriages) Act, 1944, and section 18 of the 1950 Act, and he proceeds: "It seems "to me, therefore, that Parliament has cut the ground from the "argument put forward on behalf of the husband. If English "courts will only recognize foreign decrees of divorce where the "parties are domiciled in the territory of the foreign court at the "time of the institution of proceedings, because that is the juris-"diction which they themselves claim, what is the situation when "the courts of this country arrogate to themselves jurisdiction "in the case of persons not domiciled here at the material date? "It must surely be that what entitles an English court to assume "jurisdiction must be equally effective in the case of a foreign "court."

It is, of course, on the rarest of occasions and with the utmost diffidence that one ventures even to whisper a word of difference from anything that falls from that learned Lord Justice. But I am inclined to think that he was perhaps a little hard on the courts when he used the phrase "when the courts of this country "arrogate to themselves jurisdiction." I venture to think that it would have been more apt to say that the courts of this country have imposed upon them by the legislature the duty of exercising jurisdiction in those cases.

Hodson L.J. then quotes Lord Watson in the *Le Mesurier*[51] case, and then goes on to say: "It seems that where it is "found that the municipal law is not peculiar to the forum "of one country but corresponds with a law of a second "country, such municipal law cannot be said to trench upon "the interests of that country. I would say that where, as "here, there is in substance reciprocity, it would be contrary "to principle and inconsistent with comity if the courts of this "country were to refuse to recognize a jurisdiction which

[48] [1953] P. 246, 251.
[49] Ibid. 254.
[50] Ibid. 256.
[51] [1895] A.C. 517.

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"mutatis mutandis they claim for themselves. The principle "laid down and followed since the *Le Mesurier* [51] case must, "I think, be interpreted in the light of the legislation which "has extended the power of the courts of this country in the "case of persons not domiciled here."

Hodson L.J. in the later case of *Levett* v. *Levett and Smith* [52] stated that the effect of *Travers* v. *Holley* [53] was accurately summarized in these words: "It decides that this "court will recognize the right of foreign courts to encroach "upon the principle of domicile only to the extent to which "this court also does."

Travers v. *Holley* [53] dealt with recognition of a foreign decree pronounced in circumstances similar to those covered by the present section 18 (1) (*a*) of the Matrimonial Causes Act, 1950, as did *Carr* v. *Carr*.[54]

The subsequent cases of *Arnold* v. *Arnold*,[55] *Robinson-Scott* v. *Robinson-Scott*,[56] *Manning* v. *Manning* [57] and *Gerrard* v. *Gerrard* [58] were more in the nature of section 18 (1) (*b*) cases, and undoubtedly extended the principle laid down in *Travers* v. *Holley*.[59]

It is not necessary to consider those cases in detail. Their essence is, in my opinion, to be found in the judgment of Karminski J. in *Robinson-Scott* v. *Robinson-Scott* [60]: "I "believe that the true question to be answered in this case is "whether the courts of this country can recognize a foreign "decree where, in fact, the wife was resident in the territory "of the foreign court for three years immediately preceding the "commencement of the proceedings there, even though the juris-"diction of the foreign court was based on different grounds. In "my view this question has not yet been asked or answered by "our courts, and I am, therefore, without the guidance of direct "authority. Writing in December, 1951 [65 Harvard L.R. 227], "an eminent American jurist, Dean Erwin Griswold, used these "words: 'If the heavy hand of the *Le Mesurier* [61] case can be "'lifted—as to a point which was never decided in that case— "'the courts should have little difficulty in concluding that a "'common law state may properly recognize a foreign divorce

[51] [1895] A.C. 517.
[52] [1957] P. 156, 161.
[53] [1953] P. 246.
[54] [1955] 1 W.L.R. 422.
[55] [1957] P. 237.
[56] [1958] P. 71.
[57] [1958] P. 112.
[58] The Times, November 18, 1958.
[59] [1953] P. 246.
[60] [1958] P. 71, 87.
[61] [1895] A.C. 517.

" ' granted under the factual circumstances where it would itself " ' grant a divorce.' In 1953 the Court of Appeal in *Travers* v. " *Holley* [62] lifted the heavy hand of the *Le Mesurier* [63] case, or " at least mitigated its weight.

" In my view the correct answer to the question which I have " asked myself is this: where, in fact, there has been three " years' residence by a wife in the territory of the foreign court " assuming jurisdiction in a suit for dissolution, the English court " should accept that as a ground for exercising jurisdiction, " because it would itself accept jurisdiction on proof of similar " residence in England. It is not essential for recognition by this " court that the foreign court should assume jurisdiction on the " grounds laid down by section 18 of the Matrimonial Causes Act, " 1950. It is sufficient that facts exist which would enable the " English courts to assume jurisdiction."

It was on this basis that recognition was given to the decrees of the foreign courts in whose jurisdiction the wife in each case had in fact been resident for over three years, although the jurisdiction of the foreign court by the law of that court depended on the last common residence of the parties (in *Arnold* v. *Arnold* [64] and *Manning* v. *Manning* [65]), the acquisition of a separate domicile by the wife (*Robinson-Scott* v. *Robinson-Scott* [66]) or the last common residence or the residence of the wife (*Gerrard* v. *Gerrard* [67]).

It follows, therefore, from those decisions that, provided that the wife in the present case had been ordinarily resident in New York for three years at the commencement of a suit by her there, this court would recognize a decree pronounced in such a suit, notwithstanding that the jurisdictional test in New York is one year's residence only.

Does it follow from that and from the fact that the New York courts would recognize the Mexican decree that that decree is entitled to recognition in this court? Giving to the decision in *Armitage* v. *Attorney-General* [68] its widest meaning, and assuming that the wife was still ordinarily resident in New York when she instituted the suit in Mexico, I am quite unable to see that it does.

Armitage's case [68] decides that this court will give recognition to a decree, wherever pronounced, which is recognized by the

[62] [1953] P. 246.
[63] [1895] A.C. 517.
[64] [1957] P. 237.
[65] [1958] P. 112.
[66] [1958] P. 71.
[67] The Times, November 18, 1958.
[68] [1906] P. 135.

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court of the domicile of the parties. In my judgment, it necessarily follows that this court will not recognize decrees which are not recognized by the court of the domicile, except, of course, decrees pronounced by this court itself in favour of a wife in the exercise of its jurisdiction under section 18 of the Act of 1950 and similar legislation and decrees pronounced by foreign courts in strictly analogous circumstances. Subject to those exceptions, the court of the domicile is still, in our law, the paramount authority. To the extent of those exceptions this court will recognize a decree pronounced by a court other than the court of the domicile. But apart from those exceptions there is nothing in the authorities which compels or indeed permits this court to recognize a decree which is neither pronounced by nor directly recognized by the court of the domicile.

This court is in the present case the court of the domicile. As such, it does not recognize the Mexican decree. It is, in my judgment, impossible to hold that a decree to which this court would not give direct recognition is owing to the interposition of a residential qualification of the wife in a third State entitled on account of such residential qualification to be recognized here.

The proposition advanced for the husband is that the test for recognition is now a dual one. Is the decree valid either by the law of the domicile or by the law of the place in which we recognize that the wife is concurrently entitled to proceed? If the answer to either of these questions is in the affirmative, then, it is said, the decree is entitled to recognition here. The proposition is, in my judgment, a wholly illegitimate extension of the principle of comity upon which the case of *Travers* v. *Holley* [69] and the subsequent cases turn. It is not difficult to frame an example to illustrate the impossibility of such an extension. Suppose a husband and wife domiciled in, say, Victoria, Australia. The wife goes off to New York and ordinarily resides there for over three years. She then goes to Mexico and obtains a decree there in similar circumstances to those in which the present wife obtained her decree. That Mexican decree is not recognized by the courts of the domicile, Victoria, but is recognized by the courts of the wife's residence, New York. In subsequent proceedings in the English courts the validity of the Mexican decree is called in question—for example, in proceedings as to legitimacy or inheritance after a subsequent marriage of one of the parties. This court would be faced with the position that the Mexican decree

[69] [1953] P. 246.

was not recognized by the court of the domicile but was recognized by the court of the wife's residence. Can it possibly be doubted that this court would hold, following the court of the domicile, that the decree was not entitled to recognition?

In my opinion, that is in all essentials the situation here. It is argued for the petitioner that from the point of view of public policy it is most undesirable that these parties should be regarded as single in New York and as married in England, and that by New York law another marriage by either should be permissible but would be considered bigamous here. So to hold, it is said, would create the sort of inconvenience, confusion and scandal which is referred to in so many of the authorities.

In so far as any complications of this sort have been caused by the legislature by creating exceptions to the general application of the test of domicile, the courts have but to apply the law as enacted. And, as I see it, the underlying principle of *Travers* v. *Holley* [69] and the subsequent decisions is that we should recognize here the validity of foreign decrees granted to wives by courts other than those of the domicile in the exercise of a jurisdiction strictly analogous to that exercised by this court under section 18. That jurisdiction is exercised for the protection of wives whose husbands have abandoned their domicile by desertion or through being deported, or of wives who have ordinarily resided within the jurisdiction for three years and may be said to be bona fide or genuinely resident. The circumstances of the present case are far different. The wife was never domiciled in Mexico and never had any ordinary bona fide or genuine residence there.

It may be nothing to the point that it is conceded by the husband that, if it had been he who had gone to Mexico and obtained a decree, such a decree, though recognized in New York, would certainly be invalid here. But, as I see it, to give effect to the petitioner's contention in the present case would merely be to make confusion worse confounded.

For any inconvenience, confusion and scandal which arise in the present case the parties have only themselves and their advisers to blame. Proceedings could have been validly instituted by either party in this court. Equally, as the law stands, the wife, if she had succeeded in proving her case, could in her New York action have obtained a decree which would have been valid here. They chose instead to resort to Mexico. Hence this trouble.

[69] [1953] P. 246.

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In my judgment, this part of the petition (the prayer for a declaration) fails, and it will be dismissed.

Declaration refused.

Solicitors: *Theodore Goddard & Co.; The Queen's Proctor.*

J. B. G.

C. A.

1959
March 24; *April* 20.

Hodson, Sellers and Willmer L.JJ.

BROWN *v.* BROWN.

Husband and Wife—Settlement—Variation—Post-nuptial settlement—Purchase of house by husband and wife as joint tenants on trust for sale—Whether a "settlement"—Law of Property Act, 1925 (15 & 16 *Geo.* 5, *c.* 20), *ss.* 23–38—*Matrimonial Causes Act,* 1950 (14 *Geo.* 6, *c.* 25), *s.* 25.

In October, 1952, the parties, then husband and wife, purchased in fee simple a parcel of land and a house thereon. Clause 2 of the conveyance provided: "(a) The purchasers shall hold the said "property upon trust to sell the same with power to postpone the "sale thereof and shall hold the net proceeds of sale and other "moneys applicable as capital and the net rents and profits thereof "until sale upon trust for themselves as joint tenants. (b) Until "the expiration of twenty-one years from the death of the last "survivor of the purchasers the trustees for the time being of this "deed shall have power to mortgage, charge, lease or otherwise "dispose of all or any part of the said property with all the powers "in that behalf of an absolute owner."

The parties were and continued to be the trustees. Part of the purchase price had been met by mortgage to a building society and by a loan, and both husband and wife had contributed towards repayment of the debt, the wife substantially.

In 1957 the wife was granted a divorce, and in December, 1958, she applied under section 25 of the Matrimonial Causes Act, 1950, to the commissioner for an order varying the settlement comprised in the conveyance "by extinguishing the rights and interest and "powers of the respondent husband absolutely as if he were now "dead." The judge made no order, and the wife appealed, it being submitted that the conveyance was a post-nuptial settlement:—

Held, allowing the appeal, that the conveyance should be regarded as a settlement by the parties upon themselves as trustees, which by its terms created legal and beneficial interests such as to give it the attributes of a settlement; the matter would be remitted to the judge in order that he might exercise his discretionary jurisdiction.

Dictum of Denning J. in *Smith* v. *Smith* [1945] W.N. 104; 61 T.L.R. 331; [1945] 1 All E.R. 584, 586 applied.

Prescott v. *Fellowes* [1958] P. 260; [1958] 3 W.L.R. 288; [1958] 3 All E.R. 55 distinguished.

APPEAL from Judge Shepherd Q.C. sitting as a special commissioner in divorce at Bodmin.

The plaintiff, Mrs. M. E. V. Brown, having divorced her husband, sought the variation of a settlement comprised in a conveyance regarding land and a house thereon which she and her then husband had purchased and held in trust as joint tenants. She asked that his rights, interest and powers in the trust should be extinguished.

The district registrar suggested that if the judge decided to vary the settlement it might be appropriate to leave the legal estate vested in the wife and the husband, delete the trust in their favour as joint tenants beneficially, and substitute a trust for the wife absolutely and order the husband to deliver possession to her.

The judge made no order. The wife appealed.

The facts are fully set out in the headnote and judgment.

G. D. Petherick for the wife. The jurisdiction of the court to vary a settlement has recently been reviewed by the court in *Prescott* v. *Fellowes*,[1] where Romer L.J. pointed out that it had long been established that a disposition of property might constitute a settlement for the purposes of section 25 of the Matrimonial Causes Act, 1950, notwithstanding that it would not be regarded as a settlement of property for any other purpose. Reliance is placed on the dicta of Denning J. in *Smith* v. *Smith*.[2] It is also submitted that the fact that the mortgage payments were still continuing, and that various outgoings on the house had to be periodically met, gives the conveyance the attributes of a settlement within the construction of the section. [Reference was also made to *Hubbard* (*orse. Rogers*) v. *Hubbard*[3] and *Bosworthick* v. *Bosworthick*.[4]]

The husband did not appear and was not represented.

Cur. adv. vult.

[1] [1958] P. 260; [1958] 3 W.L.R. 288; [1958] 3 All E.R. 55.

[2] [1945] W.N. 104; 61 T.L.R. 331; [1945] 1 All E.R. 584.

[3] [1901] P. 157.

[4] [1927] P. 64; 42 T.L.R. 719.

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April 20. HODSON L.J. read the following judgment of the court. This is an appeal from a decision dated December 5, 1958, of Judge Shepherd who, upon a summons by the appellant, Mrs. Brown, for variation of a settlement, comprised in a conveyance dated October 20, 1952, between one Beatrice Greaves, as vendor, and the respondent and appellant as purchasers, made no order. The appellant had appeared by counsel, but the respondent has not appeared either by counsel or in person. The appellant and respondent, formerly husband and wife, were divorced by a decree absolute dated June 18, 1957.

By the conveyance the vendor, in consideration of the sum of £975, conveyed to the purchasers in fee simple a parcel of land and a house thereon at 22, New Street, Penzance. By clause 2 of the conveyance the purchasers declared as follows: "(a) The "purchasers shall hold the said property upon trust to sell the "same with power to postpone the sale thereof and shall hold "the net proceeds of sale and other moneys applicable as capital "and the net rents and profits thereof until sale upon trust for "themselves as joint tenants. (b) Until the expiration of twenty-"one years from the death of the last survivor of the purchasers "the trustee for the time being of this deed shall have power to "mortgage, charge, lease or otherwise dispose of all or any part "of the said property, with all the powers in that behalf of an "absolute owner."

The appellant and respondent were and are trustees of the property which is the subject-matter of the conveyance. By a mortgage of the same date, expressed to be supplemental to the conveyance, the purchasers obtained an advance of £540 upon a first mortgage to the Halifax Building Society. £235, part of the purchase price, was found by a loan at 4 per cent. interest made by Greaves, the vendor's husband. The balance was found by the parties out of their own resources.

When the summons was issued the building society had been paid £214 4s. by way of capital repayments, mortgage interest and costs, and £149 12s. had been paid to Greaves in respect of the loan. The appellant has contributed substantially towards these payments, especially towards those made to the building society, out of moneys which she earned by taking in paying guests and lodgers. Since the issue of the summons some further payments have been made to the building society and to Greaves.

The appellant's object in these proceedings is to obtain exclusive possession of the property so that she can earn her living as heretofore by taking in guests and lodgers. The jurisdiction

of the court to vary settlements has recently been reviewed by the court in *Prescott* v. *Fellowes*,[1] where it was pointed out by Romer L.J.[2] that it has long been established by decisions binding on this court that a disposition of property may constitute a "settlement" for the purposes of section 25 of the Matrimonial Causes Act, 1950, notwithstanding that it would not be regarded as a settlement of property for any other purpose. Attention was drawn to *Bosworthick* v. *Bosworthick*,[3] where a wife executed a bond which secured to her husband an annuity for his life. This court held that the bond was a post-nuptial settlement, and the words of Romer J., sitting as a member of this court, were cited. He said[4] that the authorities established "that where a husband "had made a provision for his wife or a wife for her husband in "the nature of periodical payments, that amounts to a settlement "within the meaning of the section."

The court thus has to deal with two classes of documents, not only deeds vesting property in trustees and creating successive, legal or beneficial interests, so as to have the attributes of a settlement familiar to conveyancers, but also other documents by which provision is made by one spouse for another, the commonest example of which is a deed of separation which usually provides for regular payments to be made by one spouse to the other during their separation. In *Prescott* v. *Fellowes*[5] it was held that the instrument in question fell into neither of these classes, and, accordingly, an out-and-out transfer of securities made by a wife to a husband in consideration of marriage was held not to be property settled over which the court could exercise its "variation" jurisdiction. It was there pointed out that it would be highly inconvenient, if not absurd, to hold all gifts made by one spouse to the other to be settlements, and it seems to us that it would be stretching the language of the section too far so to hold and thus to invite claims after divorce for the return, for example, of articles of clothing or personal adornment.

The court was in the course of argument in *Prescott* v. *Fellowes*[5] referred to a decision of Denning J. in *Smith* v. *Smith*,[6] which had stated the principle as the court thought too widely, so as to cover the transfer into a wife's name, not only of an annuity, but also of a "house or shares." This dictum was wide enough to cover the transfer of securities which had been made

[1] [1958] P. 260; [1958] 3 W.L.R. 288; [1958] 3 All E.R. 55.
[2] [1958] P. 260, 281.
[3] [1927] P. 64; 42 T.L.R. 719.
[4] [1927] P. 64, 72.
[5] [1958] P. 260.
[6] [1945] W.N. 104; 61 T.L.R. 331; [1945] 1 All E.R. 584.

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to the husband by the wife and had been followed by Stevenson J. at first instance in *Prescott* v. *Fellowes* but seemed to this court to be clearly at variance with what had been decided in *Hubbard* (*orse. Rogers*) v. *Hubbard*,[7] where there was an assignment by a husband to a trustee of a leasehold house (in which the parties lived together) with some furniture upon trust to assign the same to the wife absolutely. The trustee assigned the leasehold to the wife accordingly, but there was held not to be a settlement within the meaning of section 5 of the Matrimonial Causes Act, 1859, the predecessor of the section now in force.

The actual decision in *Smith's* case [8] was not directly in point in *Prescott* v. *Fellowes*,[9] for the property held to be settled property in the former case was, like the property in the present case, conveyed to the husband and the wife in fee simple upon trust to sell the same with power of discretion to postpone any sale " and to stand possessed " of the net proceeds of sale " and " of the net rents and profits until sale in trust for the husband " and wife as joint tenants beneficially." There was also, as here, a mortgage, but all repayments had been made before the decree. Neither *Smith's* case [10] nor the present case is the same as *Hubbard's* case,[11] where there was no joint tenancy and no trust for sale.

The question is: can the conveyance of October 20, 1952, truly be regarded as a settlement, or is it to be treated, as was the assignment in *Hubbard's* case,[11] as being outside the scope of the section? The position is, we think, made clear by the relevant sections of the Law of Property Act, 1925, ss. 23–38, the effect of which is summarised in the judgment of Denning J. in *Smith* v. *Smith* [12] in the following passage: " The result was " that the husband and wife held a joint tenancy of the legal " estate in the land (which could not be severed) and an equitable " joint tenancy in the income of the land pending sale and of " the proceeds eventually arising from the sale (which could be " severed by taking the appropriate steps). . . . So long as the " husband and wife were living in the house, they, of course, " shared the occupation and acquiesced in a postponement of " sale, and if they had continued in that way until one died the " survivor would take the whole legal and beneficial interest in it. " If they together let or sold the house, either of them could

[7] [1901] P. 157.
[8] 61 T.L.R. 331.
[9] [1958] P. 260.
[10] 61 T.L.R. 331.
[11] [1901] P. 157.
[12] [1945] 1 All E.R. 584, 586; 61 T.L.R. 331.

" sever the equitable joint tenancy in the income or proceeds, " whereupon each would be entitled to one-half. No letting or " sale could, however, be effected by one without the consent of " the other, except by order of the Court of Chancery, which " would consider whether in the particular circumstances it was " right and proper that such an order should be made." Neither party has given any notice of severance, and so long as the power of sale is postponed, and there is no severance, the joint tenancy continues until one dies and the other takes the whole legal and beneficial interest on survivorship.

Without, therefore, resorting to the liberal construction of the word " settlement," which has been so much discussed in the authorities, it is, in our judgment, right to regard the conveyance here in question as a settlement by the parties upon themselves as trustees which by its terms created legal and beneficial interests such as to give it the attributes of a settlement. We respectfully agree, therefore, with that part of the judgment of Denning J. which deals solely with the instrument under his consideration.

Counsel contended that the fact that the mortgage payments were still continuing, and that various outgoings on the house had to be periodically met, gave the conveyance the attributes of a settlement within what we have called the liberal construction of the section, but we reject this argument seeing that none of these payments have to be made by virtue of the conveyance. The mortgage payments, which are the payments principally relied upon, are made, not under the conveyance, but under a separate instrument imposing obligations on the parties vis-à-vis the mortgagee.

We would therefore allow the appeal on the ground we have stated, and remit the matter to the learned judge in order that he may exercise his discretion, either in the manner indicated in the last paragraph of the report of the registrar or in some other manner as he thinks fit.

Appeal allowed.

Solicitors: *Corbin, Greener & Cook for Jewill, Hill & Bennett, Penzance.*

A. W. G.

1958
Nov. 4.

1959
Jan. 19, 20;
Feb. 6.

Mr. Commissioner Latey Q.C.

MORGAN *v.* MORGAN (orse. RANSOM).

Husband and Wife — Nullity — Discretionary bar — Acquiescence — Incapacity of husband—Pre-marital acts—Overt acts and concealed thoughts—Agreement "tamquam sororem"—Discretion of court.
Marriage—Agreement to marry—"Tamquam sororem" condition—Whether void—Public policy—Elderly parties.
Public Policy—Husband and wife.

The parties went through a ceremony of marriage in pursuance of an agreement that they should live together on a basis of companionship only, the husband being, at that date, 72, and the wife 59 years of age. They never lived together owing to the conduct of the wife, who left the neighbourhood the day after the marriage and never returned, nor were sexual relations ever attempted between them. The husband subsequently obtained medical advice to the effect that he was impotent at the time of the ceremony of marriage. He, thereupon, filed a petition seeking a declaration of nullity on the ground of his own incapacity:—

Held, the husband's incapacity was not a factor in the marriage at all, and it would be contrary to justice and public policy to permit him to plead his own impotence, having regard to the companionship agreement; the petition should be dismissed.

Brodie v. *Brodie* [1917] P. 271; 33 T.L.R. 525 distinguished.

In *Scott* v. *Scott*, post, p. 103, Sachs J. held that on the authorities he was left with a discretion to refuse similar relief, and the court in the present case had a similar discretion.

G. v. *M.* (1885) 10 App.Cas. 171; sub nom. *Gordon* v. *Merricks*, 1 T.L.R. 326 applied.

In considering whether and what pre-marital agreements have been reached between spouses, the court should have regard only to overt words and acts and not to the concealed thoughts of the parties.

Scott v. *Scott*, post, p. 103, followed.

Undefended petition for nullity.

The facts as set out were found by the Commissioner.

The ceremony of marriage took place on January 25, 1958, the husband was a bachelor, aged 72, and the wife 59 years of age, she being a spinster. They had first met in 1953 at Richmond. He was on holiday there and he saw her every evening until he returned to his abode at Margate. When he left she kissed him goodbye at the station. She often visited him at Margate. On these occasions he booked a room for her at an hotel, spent the days with her, and saw her to her hotel, where she spent the night, he returning home. Apart from greeting and goodbye kisses there was no manifestation of affection between them. The husband's evidence was that that form of friendship continued

for several years. He said that he loved the wife to some extent, and they liked each other's company. On various occasions she suggested that they should buy an annuity and that they should live more or less together, from the point of view of company, as she put it. Towards the end of 1957 they agreed to marry and that he should buy an annuity in her name, and she was to continue at her work. She intended to go to Australia after they married, and she told him to find a flat where they could live on her return. They were to marry on the basis of companionship. He had a small income from an annuity and the old-age pension.

The husband's evidence as to his state of mind at the inception of the marriage was as follows: Q. " You have made the remark " that she wanted a companionship marriage with you. At that " stage when you were discussing this matter, and indeed right " up to the date of this ceremony, were you agreeing to that " situation or not? "—A. " Yes." Q. " Yes. I want you to listen " very carefully to my next question and consider your answer " carefully. Tell my Lord this: did you ever hope that any " change might take place in that situation as far as the relation- " ship between you was concerned? "—A. " Well, naturally as " time goes on and we live together I might possibly have thought " possibly connection might be had, but otherwise— " Q. " You " had that in mind? "—A. " I had that in mind, certainly, like " any man would do." Q. " You had it in mind like any man " would, after you had lived with her for some time? " —A. " Lived with her for some time." Q. " As husband and " wife? "—A. " Quite."

The husband also said that at the time of the marriage in January, 1958, he had never had sexual intercourse with any woman, and that he did not know that he was incapable of sexual intercourse.

After the ceremony they went to her hotel, where she had a room for two nights. He took his meals at his own address and then went to see her at her hotel, and saw her off to London the day after the ceremony. She had slept the night after the ceremony at her hotel, and he at his home.

After the ceremony he gave her a cheque for £2,000 for the annuity. Soon after she said: " I am worried. If I leave you " you shall have your money back." He tried to calm her down, but wanted the marriage to go on as arranged. His evidence continued as follows: Q. " You told us that she wanted a marriage " on what you called ' companionship terms '—something like " that? "—A. " Yes, exactly." Q. " What did you understand

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" her to mean by that? "—A. " Well, to put it bluntly to you, " she made it quite obvious to me—I said to her: ' Can I take " ' you a cup of tea up in the mornings? ' She said: ' No, I will " ' lock the door first.' That was obviously the attitude she was " in." Q. " Let us do it completely. Did you understand or not " that she did not want to have sexual relations when you were " married? "—A. " Exactly, yes."

In reply to the question whether the wife had told him if she had ever had sexual experience, the husband said that she once told him, about a year or two before the marriage, that she had been seduced, and in that case she was a prostitute. She had a terrible temper and she went more or less mental at times with it. On the day after the marriage, a Sunday, she said nothing more about living with him. She said, before she left by train, " Don't " tell anybody about the wedding." He did not see her again until the Sunday previous to the hearing of his petition. She had written to him after the parting but he had not kept her letters. In her first letter she said she was very ill and could not work; she did not feel like a married woman, and was unhappy. Then she wrote and called him a cad and that she did not think she would live long. She had admitted one day before the marriage that she had a mental touch. She was very highly strung and she went for him one day as much as to say: " I will murder " you." He said he liked the girl so he put up with it all. She told him in a letter after the marriage to remain at Margate as his " digs " were cheap, and she would let him know directly she went to Australia. Later she wrote asking him to see her solicitor. In July, 1958, he went to see the solicitor, a member of a firm of great experience in matrimonial causes, who told him that the wife regretted directly after the ceremony having married him, and that the husband would probably get some of the money back. In fact, the cheque had passed through the bank early in February, 1958, and he had not received any of the money back.

The husband, having obtained legal advice, presented his petition in August, 1958, and it was duly served on the wife, who took no action. Three days before the hearing took place on November 4, 1958, the wife paid him an unexpected visit at Margate. She told him that he would not lose all his money. He tried to persuade her to start all over again but she refused. There was no discussion, he said, about the pending petition.

The husband's evidence as to his own state of health was that since 1919 he had suffered from a form of colitis; he had

felt giddy at times; and he had a double hernia, for which he wore a truss, upon which he had been advised that it would be dangerous to operate. A doctor examined him on July 29, 1958; he found no malformation of the genital organs, but taking into account his age and a combination of physical weaknesses he gave the definite opinion that the husband was impotent at the time of the marriage.

The matter was adjourned for argument by the Queen's Proctor.

Graham Dow for the husband.
James Comyn for the Queen's Proctor.

The argument on behalf of both parties is set out in the judgment. In addition to the cases therein cited, the following cases were referred to in argument: *W.* v. *H.**; *C.* v. *C.*†; *B.* v. *B.*‡; *F.* v. *F.*§

Cur. adv. vult.

Feb. 6. MR. COMMISSIONER LATEY Q.C., reading his judgment, referred to the facts, as set out above, and continued: I may say that it is well known that a man may be both perfectly virile and fertile in his seventies, but the doctor did not submit the husband to certain tests which are familiar to doctors expert in this branch of medicine. I do not propose to detail the medical evidence. I regret the failure to bring in medical inspectors, who by their experience are of invaluable help to the court in nullity cases. After some hesitation, however, and bearing in mind the decision in the Court of Appeal in *Hodgkins* v. *Hodgkins* [1] as to the standard of proof in such cases, I accept the evidence of the husband and the doctor that the husband was incurably impotent at the time of the ceremony.

It would follow in the ordinary case from this finding that on the authority of the Court of Appeal in *Harthan* v. *Harthan* [2] the husband petitioner would be entitled to a declaration of nullity of marriage on the ground of his own impotence. But there were extraordinary circumstances in connection with this contract of marriage raising difficulties affecting the public interest which caused me to seek the assistance of the Queen's Proctor. The question which arose was whether the husband was debarred

* (1861) 2 Sw. & Tr. 240.
† [1921] P. 399; sub nom. *Colman* v. *Colman*, 37 T.L.R. 759.
‡ [1901] P. 39.
§ 1945 S.C. 202.

[1] [1950] P. 183; 66 T.L.R. (Pt. 1) 1011; [1950] 1 All E.R. 619.
[2] [1949] P. 115; [1948] 2 All E.R. 639.

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from the relief he claimed by reason of his having entered into this marriage on the basis of mere companionship and without any intention of marital intercourse, and whether this court, which must always treat nullity cases as of national importance irrespective of the wishes of the parties, can accept the husband's mental reservations as to the bare possibility of marital intercourse in the future.

On the facts as to the pre-marital arrangement and what followed I accept the husband as a truthful witness. I also assume that he was not aware of the law as to nullity of marriage until at any rate some months after the marriage. But for his assertion of his own impotence, and possibly the companionship understanding, it is clear that he might have obtained a decree of nullity on the ground of the wife's wilful refusal to consummate the marriage. That remedy was barred, however, the moment his legal advisers became aware of his assertion of impotence.

On January 19 and 20, 1959, I heard the arguments of counsel. In *Harthan* v. *Harthan*,[3] which was not defended by the respondent wife, Lord Merriman P., in his comprehensive review of this aspect of the law of nullity, held that under the pre-reformation canon law an impotent spouse could plead his or her impotence, provided (a) that he did not know of such impotence when the ceremony took place and had not deceived the other spouse; and (b) the other spouse did not know at that time of such impotence; and neither the statute nor common law had interfered in this respect with the pre-reformation canon law which—under the Supreme Court of Judicature (Consolidation) Act, 1925, ss. 21 and 56 (3), perpetuating the principles of the old ecclesiastical court—is still operative. In *Harthan* v. *Harthan* [3] the husband petitioner, who was granted a declaration of nullity, had made futile attempts at intercourse within the first five years of his marriage. In arguendo in that case counsel incidentally drew attention to a phrase which has been employed from time to time in nullity cases, viz.—of a man marrying a woman tamquam sororem—as if a sister.

Mr. Comyn, in his able and well-reasoned address on behalf of the Queen's Proctor, has illustrated its use in various cases: for example, *Briggs* v. *Morgan* [4]; *Guest* v. *Shipley* (*falsely calling herself Guest*) [5] and *Brown* v. *Brown*,[6] in which Sir J. Nicholl said [7] in the Court of Arches: " . . . a man of sixty who marries

[3] [1949] P. 115.
[4] (1820) 2 Hag.Con. 324.
[5] (1820) 2 Hag.Con. 321.
[6] (1828) 1 Hag.Ecc. 523.
[7] Ibid. 524.

"a woman of fifty-two should be content to take her tamquam "sororem." Mr. Comyn submitted that it was not more than an obiter dictum. The expression is to be found in the works of the old canonists. Sanchez, the seventeenth-century canonist, in laying down certain principles as to nullity, wrote, inter alia, that an incapable man could suffer no hardship if required to maintain his wife tamquam sororem (Disp. CXIV, lib. VII). In my view this phrase became a convenient verbal vehicle in the context of some cases of nullity in the ecclesiastical courts but does not embody any legal principle.

Mr. Comyn, for the Queen's Proctor, accepting as a fact that at the time of this marriage the husband was impotent, deprecated the order dispensing with the examination by medical inspectors. I have already said that I agree with this view. In this class of case, where a petitioner is asking for relief owing to his or her own impotence the ordinary practice of calling at least one of the medical inspectors into the witness box to deal with the results of his examination is at least as essential as in the ordinary case. He submitted that on the facts as we know them the petitioner ought to have been very doubtful of his sexual capacity and of the likelihood or not of having marital intercourse, and as a reasonable man should have been put on inquiry as to his own condition. He pointed out that, if the marriage were valid, it was a clear case of desertion by the wife immediately after the ceremony, for which the husband could obtain a divorce after the expiry of the three years laid down by statute.

It was maintained for the Queen's Proctor that the husband must show that the non-consummation was due to his own misfortune, but his incapacity was purely incidental to the married status. Supposing a man marries a woman knowing that she was incurably stricken with poliomyelitis or so crippled that sexual intercourse was impossible: he could not claim nullity on the ground of his own impotence. Having regard to the circumstances in which this marriage was contracted he could not make a grievance now of what did not occur to him a grievance then. On this point Mr. Comyn drew attention to the practice of pleading in the ecclesiastical courts as illustrated in the fifth paragraph of the libel in *B.* v. *M.*[8] emphasising the sexual desire of the male spouse as an important factor, however frustrated, in entering into marriage. Mr. Comyn pointed out

[8] (1852) 2 Rob.Ecc. 580.

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that in *Harthan* v. *Harthan* [9] it was laid down that both parties would have to be ignorant of the supposed incapacity of one of them, but in this case there was no evidence that the wife was ignorant of it or not. Lord Merriman P. said [10] that the reaction of the wife respondent to the impotence of the husband petitioner should be taken into account in considering whether the circumstances of the case as a whole, including the respondent's attitude, were such as to debar the impotent spouse from suing.

Pausing at this stage of the argument put forward on behalf of the Queen's Proctor, I should be disposed to regard this statement of principle as irrelevant in the circumstances of this case insomuch as the wife never put the husband's potency to the test, and has abstained from any defence so that I must assume that her reaction to the petition was favourable.

Mr. Comyn urged that the petition failed for lack of sincerity and bona fides and that it would be inequitable and contrary to public policy to grant the husband the relief he sought. He pointed out that when the cohabitatio triennalis of olden days was discarded by our courts long ago—the period during which spouses in a certain type of case were expected to try and try again—there was left a discretion in the court to decide whether it was just or right to annul a marriage, and that discretion still survived. He invoked well-known passages in the classic case of *G.* v. *M.*[11] extracted from the speeches of Lord Selborne L.C.[12] and Lord Watson,[13] to show that in this case there was conduct on the part of the husband which ought to debar him from the remedy he sought. Counsel submitted that, from the standpoint of public interest, it was a vitally important case. Having entered into the marriage on the basis of companionship, the husband should not in equity or justice be allowed to claim relief from it on the ground of his own impotence.

Mr. Graham Dow, for the husband, submitted that in this case all the requirements laid down in *Harthan* v. *Harthan* [14] had been satisfied. At the time of the ceremony neither he nor the wife was aware of his impotence, and the reaction of the wife to the petition was evidenced by her not defending it. Unless there was an overriding discretion in the court to refuse the relief sought the husband was entitled to a decree. The point at issue turned on the principles of approbation and

[9] [1949] P. 115.
[10] Ibid. 143.
[11] (1885) 10 App.Cas. 171; sub nom. *Gordon* v. *Merricks*, 1 T.L.R. 326.
[12] 10 App.Cas. 171, 184.
[13] Ibid. 197.
[14] [1949] P. 115.

reprobation. In *Clifford* v. *Clifford* [15] the expression "sincerity," so often used in the past in nullity cases based on the impotence of a respondent, was considered by the Court of Appeal, and Mr. Dow quoted passages from the judgments of Tucker [16] and Bucknill L.JJ.,[17] to show that the present petitioner was not lacking in sincerity in seeking this relief. He also invoked part of the judgment of Langton J. in *Nash* v. *Nash* [18] to the same effect, that the petitioner was not lacking in sincerity.

The question of the money transferred to the wife formed no part of the husband's motive here, he said. He referred to Lord Watson's statement of principle in *G.* v. *M.*[19] as to the existence of a rule in the law of England, namely: "... that "in a suit for nullity of marriage there may be facts and circum- "stances proved which so plainly imply, on the part of the "complaining spouse, a recognition of the existence and validity "of the marriage, as to render it most inequitable and contrary "to public policy that he or she should be permitted to go on "to challenge it with effect." But here the husband had done nothing to recognise the validity of the marriage.

Counsel distinguished the recent decision of Sachs J. in *Scott* v. *Scott*,[20] a case of approbation to which I must refer later. Mr. Dow referred to the observation of Cozens-Hardy M.R. in *G.* v. *G.*[21] (in that case a decree was granted to each spouse on the ground of the other's impotence), and the observation that he referred to was that the court should exercise its discretion very carefully in granting relief in a nullity suit by a petitioner on the ground of his own impotence, but, in this case, he argued that that ground having been taken, and the husband here having proved his incapacity, a decree should follow.

In support of his case he referred to certain passages in the argument of Mr. J. E. S. Simon, for the King's Proctor, in *Harthan* v. *Harthan*.[22] Before the marriage here, though the basis of companionship was agreed upon, the husband had a secret thought that he might persuade the wife to have marital intercourse, and it was not an irrevocable agreement. As he was given no opportunity to consummate the marriage it would be just and equitable to grant the relief sought.

[15] [1948] P. 187; 64 T.L.R. 209; [1948] 1 All E.R. 394.
[16] [1948] P. 190.
[17] Ibid. 195.
[18] [1940] P. 60, 69; 56 T.L.R. 274; [1940] 1 All E.R. 206.
[19] 10 App.Cas. 171, 197.
[20] Post, p. 103.
[21] (1908) 25 T.L.R. 328.
[22] [1949] P. 115, 120–125.

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Lastly, Mr. Dow dealt with Lord Selborne's statement of the principle in *G.* v. *M.*[23] in dealing with the somewhat ambiguous word "sincerity," namely: "... there may be conduct on the "part of the person seeking this remedy which ought to estop "that person from having it: as, for instance, any act from which "the inference ought to be drawn that during the antecedent "time the party has, with a knowledge of the facts, and of the "law, approbated the marriage which he or she afterwards seeks "to get rid of, or has taken advantages and derived benefits from "the matrimonial relation which it would be unfair and inequit-"able to permit him, or her, after having received them, to treat "as if no such relation had ever existed. ... The circumstances "which may justify it are various, and in cases of this kind many "sorts of conduct might exist, taking pecuniary benefits for "example, living for a long time together in the same house or "family with the status and character of husband and wife, "after knowledge of everything which it is material to know. I "do not at all mean to say that there may not be other circum-"stances which would produce the same effect; but it appears "to me that, in order to justify any such doctrine as that which "has been insisted upon at the bar, there must be a foundation "of substantial justice, depending upon the acts and conduct of "the party sought to be barred."

In this case, said Mr. Dow, in conclusion, there was no conduct by the husband after the ceremony to bar relief. The facts were unique and no dangerous precedent would be created in pronouncing a decree.

In reply, Mr. Comyn argued that the pre-marital companionship agreement must be taken into account, and that constituted an act which barred the husband's decree in accordance with the last sentence of the passage in Lord Selborne's statement of principle. That being the conclusion of the arguments, I reserved judgment.

I have endeavoured, in my judgment, to state the substance of the arguments by both counsel, to both of whom I am indebted for their able addresses. First of all, I ought to point out that nearly all the cases cited, with the exception of *Harthan* v. *Harthan*,[24] concerned petitions for nullity by one spouse on the ground of the other's impotence, and although the principles laid down by the Earl of Selborne (Lord Chancellor) and Lord Watson in *G.* v. *M.*[25] are still generally applicable, they might have been

[23] 10 App.Cas. 171, 186.
[24] [1949] P. 115.
[25] 10 App.Cas. 171.

somewhat differently phrased if the House of Lords had been dealing with a case in which a petitioner pleaded his own impotence.

At a time when the canon law was well known to the canonists, Dr. Ayliffe in his famous work "Parergon Juris Canonici "Anglicani" (published in 1727 and referred to in *Harthan* v. *Harthan* [26]) wrote: "The husband may pray a separation of "matrimony on the account of a matrimonial impediment, though "such impediment proceeds and arises from himself, as from his "own impotency and frigidity; but if he knowingly marries a "woman that cannot render him his due, he is (notwithstanding) "bound to maintain her and shall not be divorced from her; for "he ought to impute it to himself."

In the language of those days "divorce" was often used when "nullity" was meant, there being no divorce a vinculo except in very exceptional and limited circumstances under the canon law.

The whole pith of this case is the pre-marital companionship agreement. In the ordinary case of a younger couple the agreement itself would be void as against public policy, as held in *Brodie* v. *Brodie*,[27] and it would not avoid the marriage. The agreement to live apart and the marriage in that case were contracted because the wife was about to have a child by the husband; but the marriage subsisted notwithstanding. Many elderly and aged people intermarry on the basis, implied or agreed upon, that they come together merely for companionship and without any thought of sexual relations. In some such cases, owing to advanced age or physical infirmity, one or other of the spouses might be able to prove after the marriage his or her impotence, without having had any thought of it when the marriage was arranged or solemnised, and without putting it to the test afterwards. Supposing one of these elderly or aged spouses in that condition found that he or she was not happy in this union, would it be just or right to allow him or her to plead impotence for the purpose of getting rid of the marriage? Having regard to their agreement I should say that was an act, though pre-marital, which would bar the remedy.

Scott v. *Scott* [28] was a husband's petition based on the grounds of the wife's wilful refusal to consummate the marriage or her incapacity, and Sachs J. rejected the petition on the ground of the husband's approbation of the marriage for four years, there

[26] [1949] P. 115, 133.
[27] [1917] P. 271; 33 T.L.R. 525.
[28] Post, p. 103.

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having been a clear pre-marital understanding between the parties that, in view of the wife's expressed distaste for the sexual act he would not seek marital intercourse against her wishes, unless he could persuade her to change her mind, but if he failed so to persuade her it would not matter. Within the first year after the marriage the husband made two or three half-hearted attempts at intercourse to which the wife demurred, and, thereafter, he abstained without indicating that her refusal was a grievance. He accepted the situation until he met another woman whom he wished to marry.

I have had the advantage of perusing the judgment of Sachs J. In it he referred, inter alia, to *W.* v. *W.*,[29] *Tindall* v. *Tindall*[30] and *Slater* v. *Slater*,[31] and these cases have also been cited before me in the present case. From the cases cited, including pre-eminently *G.* v. *M.*,[32] Sachs J. extracted several principles, one of which is particularly relevant to the present case, which is, that it is the overt words and acts of the husband that should be looked at, and these should be judged by their own nature and declared intention, without regard to concealed thoughts. Following the same line, I cannot accept the husband's somewhat vague mention of his mental reservation as to perhaps having sexual intercourse in the future as reliable. It was the only point in his evidence that I felt was unreliable.

On this point I adopt the words used in the Report of the Archbishops' Commission on the Law of Nullity of Marriage (1955), p. 27: "In English ecclesiastical law no agreement or "private determination is allowed to nullify a marriage, even "though it involves the frustration of one of the principal ends of "matrimony. English law looks to the consent as expressed, and "will not allow the parties privately to derogate from their public "professions."

In other words, mental reservations cannot in English law invalidate a marriage duly celebrated.

Sachs J. held that on the authorities he was left with a discretion to refuse the relief sought, and following *G.* v. *M.*[32] he did so. I feel that in this case I must do the same. I accept in substance the arguments put forward on behalf of the Queen's Proctor. The marriage was valid notwithstanding the pre-marital agreement. The husband's incapacity was not a factor in the

[29] [1952] P. 152; [1952] 1 T.L.R. 879; [1952] 1 All E.R. 858.
[30] [1953] P. 63; [1953] 2 W.L.R. 158; [1953] 1 All E.R. 139.
[31] [1953] P. 235; [1953] 2 W.L.R. 170; [1953] 1 All E.R. 246.
[32] 10 App.Cas. 171.

marriage at all, and it would be contrary to justice and public policy to allow the husband successfully to plead his own impotence, having regard to the companionship agreement. His remedy would seem to rest on divorce for desertion in due course. The petition must, therefore, be dismissed.

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Order accordingly.

Solicitors: *Girling, Wilson & Harvie, Margate; The Queen's Proctor.*

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Husband and Wife — Nullity — Discretionary bar — Acquiescence — Incapacity of wife—Contented acceptance of marriage for four years —No specific detriment to wife—Pre-marital understanding "tam-" "quam sororem."

A wife entered into marriage in April, 1950, on the basis of an understanding with the husband that there should be no sexual relationship between the parties. Until the end of 1951 the husband made certain unsuccessful attempts to persuade the wife to change her mind in that regard but, thereafter, he made it clear to her that he accepted the marriage on the basis originally envisaged. In June, 1956, the husband commenced an association with another woman with whom, at the date of the hearing, he was living in adultery. In May, 1957, he caused to be served upon the wife the present petition for a decree of nullity on the grounds of incapacity or wilful refusal to consummate the marriage. The marriage had not been consummated.

The wife, by her answer, referred to the agreement and alleged that the husband had approbated the marriage, and sought a decree of divorce on the ground of his adultery.

No allegation was made, during the hearing, that the wife had suffered any specific detriment by reason of the husband's acceptance of the marriage from 1952:—

Held, (1) that the pre-marital agreement was one which struck at the fundamental basis of the marriage and was, therefore, void, and could impose no fetter on the court in granting a decree of nullity if the facts so warranted.

Brodie v. *Brodie* [1917] P. 271; 33 T.L.R. 525 applied.

(2) That where a petitioning spouse had failed to evince "impa-" "tience under a sense of wrong and a reasonable activity in

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"complaint and redress" such conduct might constitute a discretionary bar to the granting of a decree of nullity regardless of any specific resulting detriment to the other spouse.

W. v. *R.* (1876) 1 P.D. 405 and *G.* v. *M.* (1885) 10 App.Cas. 171 applied.

(3) That the husband's acceptance of the marriage on the basis of the pre-marital understanding amounted to such a bar and, in all the circumstances of the case, the discretion of the court should not be exercised in his favour and his petition must be dismissed.

PETITION by husband for a decree of nullity on the ground of incapacity or wilful refusal. At the time of the marriage the husband was aged 43, a widower who had spent his life working in various branches of an insurance office. The wife was aged 40 at the time of the marriage, a spinster, who at the date of the hearing was still a virgin. She too had served in an insurance office for over 20 years and prior to the engagement was in a safe career leading towards a pension of £400 per annum. The husband's first wife had died in January, 1949. Her death had been preceded by a considerable period of ill health when sexual intercourse had not been practicable. In September, 1949, the husband proposed marriage to his present wife. At first the wife declined the proposal; her reasons included doubts at changing, at her stage of life, from a settled existence with the prospects of a pension at 55, to a new and far less independent existence. They also included her distaste for the idea of sexual intercourse. These matters were discussed between the parties with frankness. As regards sexual intercourse she told him that she had "absolutely no interest in the physical side of married life." She also told him that she had at an unusually early age undergone the change of life. The husband, in view of the wife's expressed lack of desire for the sexual act, gave her to understand that, while he hoped to persuade her to change her attitude, he would not seek to have sexual intercourse against her wishes; and further, that if he failed to achieve that change in her attitude then "it would not "matter," in the sense that so far as he was concerned the marriage could and would continue as one of sharing life, but without sexual intercourse. He viewed the components in marriage other than sexual intercourse as highly important. The wife accepted his statements and, while not excluding the possibility that sexual intercourse might ensue on his persuasion, was content with his assurance that "it would not "matter" if this did not happen. That position continued until April 15, 1950, when the marriage took place. Until about the end of 1951 the husband continued to hope that he could persuade the wife to accept sexual intercourse. He made two or three half-hearted attempts at intercourse and also had certain conversations with his wife on the subject. On each occasion, however, the wife made it clear that her wishes were unaltered. Both then and when the "attempts" took place the wife was conscious that the husband was disappointed at her attitude. However, he gave her no indication that her refusal of sexual intercourse was something which in the circumstances he regarded as a grievance or as something which might lead to the break-up of the marriage. On the contrary, he both then

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and later made it clear to her that he accepted and was content with the marriage in the shape that it in fact took.

At some stage in or about 1951 the husband ceased to raise the topic of sexual intercourse in conversation. It was at this point that, having tried out the marriage in the way which the wife wished it to be carried on, he accepted that way of living just as he had, before the marriage, said he would. Whatever may have been his hopes up to that time he then gave them up and made that fact known to the wife. Thereafter, until some time in 1956, the parties continued to find great happiness in each other's company and the husband throughout not merely acquiesced in there being no sexual intercourse, but genuinely accepted the marriage without it. That acceptance was made plain to his wife. In June, 1956, the husband met and began an association with a married woman. On the morning of January 1, 1957, he told the wife that he was leaving her, was not coming back except to pack, and was about to file the present petition. His evidence at trial was that the wife's reaction was one of surprise. The wife's evidence that the information came to her as a bomb-shell and rendered her, as she put it, "nearly demented" was accepted by the court. Within 48 hours of having been thus apprised that the husband regarded the question of sexual intercourse as fundamental and that its absence put the marriage in peril, the wife wrote to the husband, to whom she remained devoted, a sincere letter, one sentence in which was meant to convey and did convey to the husband an offer of sexual intercourse. The husband remained in the matrimonial home. His evidence was that he continued there "in his own interest" and had no intention of becoming reconciled to his wife, far less of having sexual intercourse with her: he had made up his mind to continue and did continue with the other woman that association which he concealed from his wife till well after his petition was put on the file.

From January to May, 1957, the husband and wife remained under the same roof, but the period was an unhappy one for both. On May 21, 1957, the husband caused this petition to be served upon her, and at the beginning of June, 1957, he left the matrimonial home. At the date of the hearing he was living with the other woman who, notwithstanding that fact, was granted a decree nisi of divorce by Sachs J. in proceedings which were interposed in the course of the hearing of the nullity suit.

The wife, by her answer, referred to the agreement and alleged that the husband had approbated the marriage and sought a decree of divorce on the ground of the husband's adultery with the other woman.

It was common ground that the marriage had never been consummated. No allegation was made during the hearing that the wife had suffered any specific detriment by reason of the husband's acceptance of the marriage from 1952.

Dimitry Tolstoy for the husband.
Jack Sarch for the wife.

The cases cited in argument were referred to in the judgment.

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November 27. SACHS J., reading his judgment, stating that he preferred the evidence of the wife and her witnesses to that of the husband, referred to the facts and continued: It being common ground that the marriage has never been consummated, I now turn to the main issues between the parties, viz., whether the husband, on his side, has proved either incapacity on the part of the wife, or that the marriage has not been consummated "owing to the wilful refusal of the respondent to "consummate the marriage"; and whether the wife, on her side, has proved that there has been such conduct on the part of the husband as to preclude him from being granted a decree, even if he succeeds on one of the two issues which he has set out to establish.

First of all, however, it is convenient to refer to one other matter that was much canvassed in the course of the trial—that is, the effect of the mutual understanding that "it would not matter" if there was no sexual intercourse.

In evidence, the wife, with characteristic fairness, never referred to this understanding as an agreement, but rather as a matter of mutual explanations as to what was the attitude of each party to the prospective engagement. Even, however, if it could be said to be an "agree-"ment" (and it probably bears all the outward characteristics of a collateral agreement other than an intention to create legal relations), it is to be noted that at the time the husband was known to be capable of sexual intercourse, and it certainly was not known that the wife was incapable. In those circumstances, any such agreement would be one striking fundamentally at the basis of marriage itself, and would undoubtedly be void as between the parties (cf. *Brodie* v. *Brodie* [1]). Equally clearly, it could impose no fetter on the court in granting a decree of nullity if the facts so warranted.

On the other hand, the very fact that such an understanding or agreement is reached may be of considerable importance when it becomes necessary to draw inferences in relation to matters vital to the determination of other issues in the case.

Normally, it would be apposite next to deal with the issues of incapacity and wilful refusal. These, however, present certain difficulties, not least as to what are the inferences which ought to be drawn from the primary facts as proved in evidence. Moreoever, even if the husband were to succeed on either of those issues, he must still meet the defence that his conduct has precluded him from being granted relief. The facts relating to that defence being clear, it thus seems best to deal with it first and examine whether it is decisive.

The present case is one in which it is perfectly plain that there has been a considerable period when the husband was, despite the absence of sexual intercourse, truly content with a devoted marriage, and made it clear to his wife that, despite that absence, he fully accepted the marriage.

On those facts arises the clear-cut question as to whether such an acceptance over a period of the order of four years constitutes a bar to the petitioner's claim. Now that 101 years have passed since the date of the first Matrimonial Causes Act, it could be expected that the books would provide a firm basis for the answer to that question; but one's

[1] [1917] P. 271; 33 T.L.R. 525.

confidence in that behalf is not unduly enhanced on finding that in every reported case that has, in the last decade, gone to the Court of Appeal on the question as to what constitutes a bar, the trial judge has been reversed.

The locus classicus for expositions of the relevant law (a branch of that sometimes described by the much criticised word "insincerity") is *G.* v. *M.*[2] There Lord Watson stated[3]: ". . . in a suit for nullity "of marriage there may be facts and circumstances proved which so "plainly imply, on the part of the complaining spouse, a recognition "of the existence and validity of the marriage, as to render it most "inequitable and contrary to public policy that he or she should be "permitted to go on to challenge it with effect"; and that passage has been described by Singleton L.J.[4] as the most clear, and by Jenkins L.J.[5] as the most succinct, statement of the law. The Earl of Selborne in an almost equally frequently quoted passage said[6]: ". . . there "may be conduct on the part of the person seeking this remedy which "ought to estop that person from having it . . ." After giving examples of such conduct, including, first, approbation of the marriage with knowledge of the facts and law and, secondly, the taking advantages from the matrimonial relation which would make it inequitable or unfair to treat that relation as if it never existed, he later went on to say as regards this bar[7]: "The circumstances which may justify it are "various, and in cases of this kind many sorts of conduct might exist, "taking pecuniary benefits for example, living for a long time together "in the same house or family with the status and character of husband "and wife, after knowledge of everything which it is material to know," and[8] ". . . there must be a foundation of substantial justice, depend-"ing upon the acts and conduct of the party sought to be barred."

It is, of course, obvious from the phrases used by the Lords of Appeal, that neither of them were suggesting that the spouse who seeks to set up the bar must necessarily prove all those ingredients which are required to establish an estoppel in pais: nor have the recent authorities so laid down; though it would naturally be difficult to imagine a case where those ingredients were all proved and there was no bar. The word "estop" is used in the broad sense of "bar."

In relation to any narrow technical use of the word "estop" in connection with this bar, with its concomitant concept of a specific change in the position of a respondent spouse, it is also to be noted that such an alteration in the position of a devoted but non capax wife on account of her husband's conduct in approbating the marriage would normally be hard indeed to establish, for the only effect of the approbation would be to make her want not to change the position. So it is on the footing that to establish a bar it is not necessary to prove the equivalent of an estoppel in pais that I now turn to the recent authorities which have been so carefully cited to me by Mr. Sarch and by Mr. Tolstoy, to see what other points directly relevant to the present facts and binding upon a court of first instance can be gathered from them.

[2] (1885) 10 App.Cas. 171.
[3] Ibid. 197.
[4] *Tindall* v. *Tindall* [1953] P. 63, 69; [1953] 1 All E.R. 139.
[5] *W.* v. *W.* [1953] P. 152, 164; [1952] 1 All E.R. 858.
[6] 10 App.Cas. 171, 186.
[7] Ibid.
[8] Ibid.

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In particular, I refer to four of the cases which reached the Court of Appeal, *Clifford* v. *Clifford*,[9] *W.* v. *W.*,[10] *Tindall* v. *Tindall*[11] and *Slater* v. *Slater*.[12]

From these it appears that (1) the remedy sought is a personal one as between husband and wife, and it is to the conduct as between these two that the court should look; (2) it is the overt words and acts of the husband that should be looked at and these should be judged by their own nature and declared intention, without regard to concealed thoughts; (3) the mere fact that a long time has elapsed between the date of the marriage and the date proceedings were commenced does not of itself constitute a bar; (4) the mere fact that each party continues to share, whilst under the same matrimonial roof, the normal mutual domestic services derivable from a joint establishment, does not of itself constitute a bar; (5) the mere receipt of financial benefits does not of itself constitute a bar; (6) if the present facts do constitute a bar, it is a discretionary and not an absolute bar.

It is, however, to be noted as regards both the third and fourth points that in each case cited to me where it was held that the petitioner was not barred, there either was evidence of continuing complaints or separation or, alternatively, there was no apparent argument that the absence of sexual intercourse had been the subject of affirmative acceptance or contented acquiescence on the part of the petitioner.

Into the former category fall *G.* v. *M.*[13] (see Lord FitzGerald's speech [14]), and *Clifford* v. *Clifford*[15] (see the judgment of Tucker L.J.[16]). Into the latter falls *Clarke* (*orse. Talbott*) v. *Clarke*[17] as determined by Pilcher J.

Accordingly, the law applicable where the petitioning spouse has contentedly acquiesced in or expressly accepted a married life without sexual intercourse has nowhere been held to be other than that applied in the well-known judgment of Sir Robert Phillimore in *W.* v. *R.*[18] when dismissing a petition for nullity some 10 years before *G.* v. *M.*[19] There, after a very full review of the authorities (including the Privy Council opinion in *B.* v. *B.*,[20] as delivered by Dr. Lushington), Sir Robert Phillimore referred to the judgment of Lord Penzance in *M.* v. *C.*[21] in which he stated[22]: "... the petitioner is "bound to have evinced impatience under a sense of wrong and a reasonable activity in complaint and redress. The court cannot recognise "these features in the conduct of the petitioner. On the contrary, she "appears to have lived contentedly enough with her husband until, as "she says, he ill-treated her." That passage was quoted with approval by Tucker L.J. in *Clifford* v. *Clifford*[23] and he went on to say of the

[9] [1948] P. 187; 64 T.L.R. 209; [1948] 1 All E.R. 394.
[10] [1952] P. 152; [1951] 1 T.L.R. 879; [1952] 1 All E.R. 858.
[11] [1953] P. 63; [1953] 2 W.L.R. 158; [1953] 1 All E.R. 139.
[12] [1953] P. 235; [1953] 2 W.L.R. 170; [1953] 1 All E.R. 246.
[13] 10 App.Cas. 171.
[14] Ibid. 206.
[15] [1948] P. 187.
[16] Ibid. 194.
[17] [1943] 2 All E.R. 540.
[18] (1876) 1 P.D. 405, 410.
[19] 10 App.Cas. 171.
[20] (1854) 1 Spink Eccl. & Adm. 248.
[21] (1872) 2 P.D. 414.
[22] Ibid. 419.
[23] [1948] P. 187, 193.

facts before him[24]: "It is not a case in which he was acquiescing in "his wife's disability, and contentedly leading a married life until "some incident arose, such as ill-treatment of his wife by the husband, "as referred to by Sir Robert Phillimore in *W.* v. *R.*[25] This case is "different: the husband was throughout seventeen years of his married "life showing himself dissatisfied with the state of affairs which "existed."

R. v. *R.*,[26] referred to in Latey on Divorce, 14th ed. (1952), p. 202, seems also to support the reasoning adopted in the above cited passages.

At this stage it is necessary to deal with the point taken by Mr. Tolstoy that the husband was not at the material times aware of his right to seek the remedy for which he now prays.

In all the cases dealing with the type of bar under consideration stress has been laid on the fact that there can be no bar if the petitioner was not sufficiently aware that the remedy of a decree of nullity was available. When referring to the requisite that the petitioner must have evinced impatience under a sense of wrong and a reasonable activity in complaint and redress, Lord Penzance in *M.* v. *C.*[27], however, prefaced his statement with the words: "The general "circumstances of each case and the facilities of the party aggrieved "for obtaining legal advice and assistance will vary indefinitely . . ."

In the present case the husband had for many years been employed in a responsible position in the head office of a well-known insurance company and was, as he admitted, very well placed for getting any desirable legal advice. Moreover, he never suggested that he was not aware that nullity proceedings were available where a marriage was not consummated, but alleged that, by the time he gave up hope of sexual intercourse, three years had passed since the marriage and he thought that by virtue of something equivalent to a statute of limitations the remedy was then no longer open to him. That plea I reject for more than one reason. First, I have, as already stated, come to the conclusion that he gave up hope well before three years had passed after the marriage: next, his testimony on this point was so unconvincingly given that I am not prepared to accept it as rebutting the presumption of knowledge of the law to which Jenkins L.J. referred in *W.* v. *W.*[28] and, further, in any event his complete failure to make any inquiry for so long a period is the converse to that impatience and reasonable activity to which Lord Penzance referred.[27]

In the result, accordingly, although no specific change in the wife's position has been shown to result from the husband's above-stated contented acceptance as from 1952 of the marriage without sexual intercourse, there seems to be authority for holding that his conduct constitutes a bar within the rule as laid down by Lord Watson in *G.* v. *M.*[29] In so concluding I am, of course, not overlooking the fact that there are, in the authorities cited to me, a number of statements which could be construed as requiring some specific detriment

[24] [1948] P. 187, 194.
[25] 1 P.D. 405.
[26] Unreported, November 14, 1934, aff. February 25, 1935.
[27] 2 P.D. 414, 419.
[28] [1952] P. 152, 165.
[29] 10 App.Cas. 171, 197.

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to the wife since 1952 to be proved before the bar could come into existence. Those passages, however, occur in judgments concerned with facts different from those of the present case and were not intended to narrow down the breadth of the rule as stated by Lord Watson: and any narrowing down of that type would indeed be inconsistent with that range of the varieties of circumstances capable of constituting the bar which has been referred to by the Earl of Selborne in *G.* v. *M.*[30] and by Birkett L.J. in *Tindall* v. *Tindall.*[31]

In relation to this question of specific change I have already adverted to the position of a wife such as the respondent in this case. Looking, however, at the position of husbands and wives from a more general point of view, it is relevant to note that, at any rate as regards those of reasonably mature age, the gradual passage of time inevitably effects each year some degree of change in the physical and material existence of each individual and his or her prospects, and that, if anything, such changes are liable to be more pronounced for women than for men. Each year that passes is thus liable to affect the position of a woman as regards what will be her future if she ceases to have as husband the man to whom she thinks she is married. Moreover, the case can also arise of a wife whose incapacity derives only from frigiditas quoad hunc—she being otherwise apta viro—who would be in a position herself to seek a decree of nullity on that ground, who, being less devoted than the respondent in this case, might, at any rate, have considered initiating such a petition if her husband had not made clear his acceptance of the marriage without sexual intercourse, but who could not, years later on becoming a respondent, point to any specific detriment except the passage of time.

Taking, accordingly, that broad view of substantial justice which is inherent in the above cited phrases of the Earl of Selbourne and Lord Watson, it would to my mind be, indeed, surprising if the law permitted a man who had accepted the marriage for a considerable time nevertheless to turn round at any moment at his whim and then, as of absolute right, claim a decree that the marriage never existed: and if support is needed for that view it can be found, I think, in what Dr. Lushington said in *B.* v. *B.*[32] Such a state of affairs would lead to situations in which the granting of a decree would have that element of inhumanity to which Sir Robert Phillimore referred in *W.* v. *R.*[33] Thus, the existence of a bar in cases such as the present accords with the general sense of Lord Watson's words as well as with the authorities, such as *W.* v. *R.*[34]: any hard cases resulting from its existence can be dealt with by the court's exercise of discretion.

Whether the facts which constitute the bar in this case can be said to fall within some term such as recognition of, approbation of or election to be bound by the marriage, improper delay, or some other compendious expression, is a matter upon which I prefer not to embark. The authorities make it clear that no single word or

[30] 10 App.Cas. 171, 186.
[31] [1953] P. 63, 76.
[32] 1 Spink Eccl. & Adm. 248, 260, 261.
[33] 1 P.D. 405, 408.
[34] 1 P.D. 405.

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short expression can embrace or was ever intended to embrace all the circumstances that cause the bar to arise.

The next question, accordingly, is whether this is a case in which the bar should be applied. On this I assume that the whole history of the marriage and the ages and other circumstances of the parties can be taken into account. On the facts of the present case the court's discretion should not, in my view, be exercised in favour of a man of the petitioner's age, who, incidentally, has stated that he does not desire to found a family.

Here reference must be made once more to the fact that the wife, to the husband's knowledge, gave up the prospect of a £400-per-annum pension to marry him. Whilst against the submissions that this pre-marriage change of position by the wife could be taken into account when deciding whether there was a bar, it seems to me that it could properly be put in the scales on the question of discretion, though I did not find it necessary so to use it.

It follows that in the present case the husband is barred from obtaining the decree he seeks and the prayer of the petitioner must be rejected.

[His Lordship then referred to the evidence on the issues of incapacity and wilful refusal, holding as to the former that at all material times consummation was probably impracticable but doubting whether impracticability had, in view of the fact that delay by a petitioner added to the burden of proof upon him, been proved with the clarity required in a nullity suit. He further held that although there was a persistent and considered refusal by the wife, in view of the pre-marital agreement and the conduct of the husband thereafter the non-consummation could not, in law, be said to be "owing to" that refusal.]

Solicitors: *W. G. Street & Co.; Saunders, Son & de Wolfe.*

E. J.

BLENHEIM (OWNERS) *v.* IMPETUS (OWNERS). THE IMPETUS.

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April 6, 7, 16.

Karminski J.

[1957 B. 394.]

Shipping—Towage—Contract—Construction—Negligent navigation of tug—Towage agreement—Construction—"Whilst towing"—"When "the tug is in a position to pick up ropes or lines"—United Kingdom Standard Towage Conditions.

Ships' Names—The Impetus.

The United Kingdom Standard Towage Conditions were incorporated in a contract under which the defendants, who were tug-owners, agreed to provide two tugs to tow the plaintiffs' vessel

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Blenheim. One of these tugs, the *Impetus*, approached the *Blenheim* and was making a turn to starboard so as to be able to pass a line to her, when she came into collision with the *Blenheim's* starboard side, causing damage thereto. Prior to the collision no orders had been given from the *Blenheim*, as she had been regularly towed by the *Impetus* and both ships' crews were well acquainted with the necessary towage procedure. At the time of the collision the *Impetus* was in a position to receive any orders given from the *Blenheim* to pick up ropes or lines, but was not yet in a position where those on board her could heave a line to the *Blenheim*, although those on board the *Impetus* were prepared to heave a line and those on board the *Blenheim* were ready to receive such line at the appropriate time.

The United Kingdom Standard Towage Conditions provided, inter alia: "(1) For the purpose of these conditions the phrase "'whilst towing' shall be deemed to cover the period commencing "when the tug is in a position to receive orders direct from the "hirer's vessel to pick up ropes or lines, or when the towrope has "been passed to or by the tug, whichever is the sooner . . . Towing "is any operation in connection with holding, pushing, pulling or "moving the ship. (2) On the employment of a tug the master "and crew thereof become the servants of and identified with the "hirer and are under the control of the hirer or his servants or "agents, and anyone on board the hirer's vessel who may be "employed and/or paid by the tugowner shall be considered the "servant of the hirer. (3) The tugowner shall not, whilst "towing, bear or be liable for damage of any description done by "or to the tug, or done by or to the hirer's vessel, or for loss of or "damage to anything on board the hirer's vessel . . . arising from "any cause, including negligence at any time of the tugowner's "servants or agents . . . and the hirer shall pay for all loss or "damage . . . and shall also indemnify the tugowner against all "consequences thereof."

The defendants admitted that the collision was caused by the negligent navigation of the *Impetus*, but claimed that clause 2 and/or clause 3 of the towage conditions protected them from liability:—

Held that, since at the time of the collision the *Impetus* was in a position to receive orders direct from the hirer's vessel to pick up ropes or lines, if such orders had been necessary, the collision had occurred "whilst towing" within the meaning of clause 1 of the conditions, although the *Impetus* had not been in a position to carry out such orders; accordingly, the defendants were protected by the terms of clause 3 from liability for damage caused by the negligent navigation of their vessel.

Glen Line Ltd. v. *W. J. Guy & Sons. The Glenaffric* [1948] P. 159, sub nom. *Guy (W. J.) & Son* v. *Glen Line Ltd.* [1948] 1 All E.R. 245; 81 Ll.L.Rep. 174 applied.

The Uranienborg [1936] P. 21; 52 T.L.R. 114; 53 Ll.L.Rep. 165 distinguished.

ACTION.

On June 15, 1956, a collision occurred in the River Tyne between the plaintiffs' vessel *Blenheim* and the defendants' tug *Impetus*. The *Blenheim* was a regular visitor to the Tyne and had been towed by the *Impetus* on many occasions.

As the *Blenheim* was proceeding on a normal up-river course, the *Impetus*, which had been engaged to tow the *Blenheim* under a towage agreement which incorporated the United Kingdom Standard Towage Conditions, left her moorings and approached the *Blenheim* on her starboard side. The *Impetus* attempted to turn hard to starboard and to come on to a parallel course to the *Blenheim* for the purpose of passing a line, but failed to complete her turn and came into collision with the *Blenheim's* starboard side, causing damage thereto. No orders had been given from the *Blenheim*, as those on board both vessels knew from long usage how the towage connection was to be established, but at the time of the collision the *Impetus* was in a position to receive orders from the *Blenheim* to pick up ropes or lines, if such orders had been necessary. The mate and three members of the crew of the *Impetus* were on her after-deck ready to throw a heaving line to the *Blenheim*, while several of the crew of the *Blenheim* were standing by on her forecastle head ready to receive the line, but the *Impetus* had not yet reached a position where the line could be passed.

The relevant clauses of the United Kingdom Standard Towage Conditions provided:

" (1) For the purpose of these conditions the phrase ' whilst " ' towing ' shall be deemed to cover the period commencing when " the tug is in a position to receive orders direct from the hirer's " vessel to pick up ropes or lines, or when the towrope has been " passed to or by the tug, whichever is the sooner and ending " when the final orders from the hirer's vessel to cast off ropes or " lines have been carried out, or the towrope has been finally " slipped and the tug is safely clear of the vessel, whichever is " the later. Towing is any operation in connection with holding, " pushing, pulling or moving the ship.

" (2) On the employment of a tug the master and crew thereof " become the servants of and identified with the hirer and are " under the control of the hirer or his servants or agents, and " anyone on board the hirer's vessel who may be employed and/or " paid by the tugowner shall be considered the servant of the " hirer.

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" (3) The tugowner shall not, whilst towing, bear or be liable " for damage of any description done by or to the tug, or done " by or to the hirer's vessel, or for loss of or damage to anything " on board the hirer's vessel, or for the loss of the tug or the " hirer's vessel or for any personal injury, or loss of life, arising " from any cause, including negligence at any time of the tug- " owner's servants or agents, unseaworthiness, unfitness or break- " down of tug, its machinery, boilers, towing gear, equipment, or " hawsers, lack of fuel, stores or speed, or otherwise, and the " hirer shall pay for all loss or damage and personal injury or loss " of life, and shall also indemnify the tugowner against all " consequences thereof."

By their statement of claim the plaintiffs alleged that the collision was solely caused by the negligent navigation of the *Impetus*. By their defence the defendants denied negligence and alleged that the collision was caused by the negligence of those on board the *Blenheim*. Alternatively, the defendants contended that the collision had occurred " whilst towing " and/or during " the employment of a tug " within the meaning of the United Kingdom Standard Towage Conditions, upon the terms of which the *Impetus* had been engaged, and that the defendants were protected from liability by clause 2 and/or clause 3 thereof. The plaintiffs by their reply admitted that the *Impetus* had been engaged under the terms of the United Kingdom Standard Towage Conditions, but denied that at the time of the collision those conditions had attached. By an amendment to their defence the defendants admitted that the collision was solely caused by the negligent navigation of the *Impetus*, and relied only by way of defence to the plaintiffs' claim upon the terms of the towage conditions.

J. V. Naisby Q.C. and *R. F. Stone* for the plaintiffs. The sole point for decision in this case is whether the United Kingdom Standard Towage Conditions had attached at the time of the collision. Clause 1 clearly provides an extension of the time in which actual towing is performed. The question raised by the clause is how long before physical towing and in what circumstances the period " whilst towing " begins. If the phrase " in a " position to receive orders direct from the hirer's vessel to pick " up ropes or lines " means merely " when the tug is within " hailing distance," this collision occurred " whilst towing," but it is submitted that the phrase means more than that. The towage conditions in their present form have been in use for over

30 years and they were considered for the first time in *The Uranienborg*,[1] where it was held that both the tug and the tow must be considered—that the tow must be ready to give the orders and that the tug must at least be in a position to receive and act upon those orders. In the present case, the tug and the tow knew the normal procedure, and no orders were necessary, but the tug was not ready to receive and carry out any orders if they had been given. [Reference was also made to *The Baltyk*[2]; *The Glenaffric*[3]; *Partafelagid Farmur* v. *Grangemouth and Forth Towing Co.*[4]]

Waldo Porges Q.C. and *H. V. Brandon* for the defendants. The real test of the interpretation of the words "whilst towing" is whether this collision happened while the tug was manoeuvring for the purpose of towing the *Blenheim*—for the purpose of taking ropes or lines. The interpretation of the phrase "whilst towing" in clause 1 is intended to cover a period beginning before connection is established and ending after connection has ceased. If it had been intended that the period should not begin until the tug was exactly in a position where lines could be taken, the clause would have said that the tug must be "in a position to receive "direct from the hirer's vessel ropes or lines." In fact, it says that it must only be "in a position to receive orders . . . to pick "up ropes or lines." *The Uranienborg*[5] is clearly distinguishable as in that case no one on the ship or the tug had any intention of doing anything in connection with an ordinary towing operation. (See *per* Scott L.J. in *The Glenaffric*.[6]) In the present case there can be no dispute that for some short time before the collision everyone was thinking of ropes and lines, and the tug at the time of the collision was manoeuvring to throw a line.

[KARMINSKI J. The word "orders" causes me difficulty, as in this case no orders were necessary.]

It is submitted that the tug should be in a position to receive orders if they are given. If a new tug or an unfamiliar ship had been involved, orders might have been necessary. The phrase is unambiguous and, in the absence of ambiguity, no words should be added to it to ascertain its meaning. See *per* Scott L.J. in *The Glenaffric*.[7]

[1] [1936] P. 21; 52 T.L.R. 114; 53 Ll.L.Rep. 165.
[2] [1948] P. 1; [1947] 2 All E.R. 560; 80 Ll.L.Rep. 668.
[3] [1948] P. 159; [1948] 1 All E.R. 245; 81 Ll.L.Rep. 174.
[4] [1953] 2 Lloyd's Rep. 699.
[5] [1936] P. 21; 52 T.L.R. 114; 53 Ll.L.Rep. 165.
[6] [1948] P. 159, 166.
[7] Ibid. 165.

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The end of the period is described very directly: " . . . when " . . . the tug is safely clear of the vessel." The beginning of the period is really " when the tug is no longer safely clear of the " vessel " or " when the tug is in close proximity to the vessel." This is when she begins to incur the risk of damage. In *The Glenaffric* [8] the tug would have been in no danger if she had not been manoeuvring to tow. She was not yet clear of the ship. *Partafelagid Farmur* v. *Grangemouth and Forth Towing Co. Ltd.*[9] is a Scottish case and, though not binding on this court, is relied on as supporting the defendants' case. " The tug has only to be " in a position to receive orders direct from the ship to pick up " ropes or lines and there is no necessity for the tug herself to " be in a position to take up the ropes or lines ": *per* Lord Hill Watson.[10]

Naisby Q.C. in reply. Clause 1 must be approached on the basis, not that the shipowner has to prove anything, but that the tug owner has to prove that the clause covers him. It must therefore be construed against him. The words in clause 1 cannot be taken at their face value, as they extend the term " whilst " towing " to cover a period which is not towing at all. The extension must be scrutinised carefully. The clause speaks of being " in a position to receive orders direct from the hirer's " vessel to pick up ropes or lines," not simply " to receive orders " direct from the hirer's vessel."

[KARMINSKI J. That was meant to exclude other orders, such as to collect mail from another ship.]

If the tug need only be within hailing distance, it would not matter what the orders were about. Lord Merriman P. in *The Uranienborg* [11] and Bucknill and Somervell L.JJ. in *The Glenaffric* [12] considered that the words of the clause could not be taken at their face value. They speak of " a bilateral arrange- " ment," although there is nothing in the clause to say that the tow must be ready to give orders. To say that the tug must be ready to carry out the orders is doing far less violence to the words of the clause than to say that she must be manoeuvring for the purpose of towing.

The dictum of Lord Hill Watson in *Partafelagid Farmur* v. *Grangemouth and Forth Towing Co. Ltd.*[13] is contrary to the

[8] [1948] P. 159; [1948] 1 All E.R. 245; 81 Ll.L.Rep. 174.
[9] [1953] 2 Lloyd's Rep. 699.
[10] Ibid. at p. 701.
[11] [1936] P. 21; 52 T.L.R. 114; 53 Ll.L.Rep. 165.
[12] [1948] P. 159; [1948] 1 All E.R. 245; 81 Ll.L.Rep. 174.
[13] [1953] 2 Lloyd's Rep. 699, 701.

decisions in *The Uranienborg* [14] and *The Glenaffric*.[15] The clause refers to "orders . . . to pick up ropes or lines." An order to come in closer and take a rope is not an order to pick up a rope. An order to pick up a rope applies only when the tug is in a position to take the rope. The tug in this case was clearly not in such a position. The present case can only be decided against the plaintiffs by distinguishing *The Uranienborg*,[16] and by rejecting the reasoning of Lord Merriman P. in that case.

April 16. KARMINSKI J. delivered the following judgment, in which he stated the facts, referred to the admission of negligent navigation by the defendants, found that the angle of collision was approximately 75 degrees, and continued: The defendants, however, raised another matter of substance. Relying on the terms of the United Kingdom Standard Towage Conditions it is alleged that at the time of the collision the *Impetus* was ready to throw a heaving line to the *Blenheim* and the *Blenheim* was ready to receive the line aboard and to bend it on to one of the *Blenheim's* wires to be used as a towing hawser. It is contended that the collision occurred within the meaning of the conditions whilst the *Impetus* was towing the *Blenheim* or during the employment of the *Impetus* as a tug and that, therefore, notwithstanding the negligence of the *Impetus* the defendants are protected by clause 2 or 3 of the towage conditions.

[His Lordship read clauses 1, 2 and 3 of the conditions and continued:] By their reply the plaintiffs admitted that the *Impetus* was engaged to tow the *Blenheim* under the terms of the towage conditions, but specifically denied that at the time of the collision such conditions had attached. Indeed it was conceded by Mr. Naisby in opening his case that the sole point for decision was whether or not at the time of the collision the towage conditions had attached. It is not suggested by the defendants that the towrope had been passed to or by the tug at the time of the collision.

For the defendants, Mr. Porges submitted that the words of clause 1 construing the term "whilst towing" refer to receiving orders to pick up ropes or lines, and not to receiving the ropes or lines themselves. It is common ground in this case that no orders were in fact given by those on board the *Blenheim*

[14] [1936] P. 21; 52 T.L.R. 114; 53 Ll.L.Rep. 165.

[15] [1948] P. 159; [1948] 1 All E.R. 245; 81 Ll.L.Rep. 174.

[16] [1936] P. 21; 52 T.L.R. 114; 53 Ll.L.Rep. 165.

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to the *Impetus*, since the crews of both ships knew from long usage precisely what to do. At the moment of collision those on board the *Impetus* were prepared to heave a line, and those on board the *Blenheim* were ready to receive the heaving line from the *Impetus* and to secure it to their own wire.

With this proposition Mr. Naisby was in partial agreement, but argued that the true test was whether or not the *Impetus* was at the time of the collision ready to receive and to carry out the order to heave her line, if such order had been given. In Mr. Naisby's submission the *Impetus* was at the time of the collision in no position either to heave her own line or to receive the *Blenheim's* wire, since she was approaching the *Blenheim* at an angle of nearly 90 degrees. In cross-examination the mate of the *Impetus* agreed that both before and at the time of collision he was not in a position to heave a line to the *Blenheim*. In fact, he heaved his line quite shortly after the collision.

I have no difficulty in accepting Mr. Naisby's contention that the burden in this case is on the defendants to establish that they have brought themselves within the protection of clauses 1 to 3 of the towage conditions. Clause 1 has, as it seems to me, extended the ordinary meaning of the words " whilst towing " to cover a state of affairs in which towing is contemplated but not being carried out.

It is clear on the evidence that at the time of the collision the *Impetus* was in a position to receive the order to heave the line, but was not in a position until after the collision to carry out such an order. The fact that the *Blenheim* on this as on very many earlier occasions gave no order is in a sense irrelevant. The question is whether at the collision the *Impetus* was in a position to receive orders from the *Blenheim* to pick up ropes or lines had such orders been given.

The United Kingdom Standard Towage Conditions in their present form have been in use, as I was told by counsel, for over 30 years. During that period they have been judicially considered on several occasions, but I find it necessary to consider only two decisions. In *The Uranienborg* [1] the tug was engaged to help a ship from a wharf. The tug arrived early and before the ship had finished discharging and while she was still waiting for a pilot and boatmen. The tug collided with the ship at a moment when the ship was not ready to give orders to pick up ropes or lines, and when the tug was neither thinking about nor expecting

[1] [1936] P. 21; 52 T.L.R. 114; 53 Ll.L.Rep. 165.

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such an order. It was argued on behalf of the tug that she came within the definition of "whilst towing" because there was a contract of towage, and because she was within hailing distance of the ship at the time of collision.

This argument was rejected by Merriman P. as being too wide. Discussing the meaning of the word "position," the President said [2]: "I doubt whether the word 'position' is only "used in the sense of local situation. I think it involves also the "conception of the tug being herself in a condition to receive and "act upon the orders. But however that may be, the orders "which she is to be in a position to receive are orders to pick up "ropes or lines—not orders generally, but these specific orders, "and I think that that must have some reference to the intention "of those on board the ship to give those orders, and to the readi-"ness of those on board the tug to receive them." Pointing out that in that case at the time of collision those on board the tug were not thinking about, and had not begun to expect, an order to pick up ropes or lines, the President concluded his judgment in these terms [3]: "In my opinion the least that is involved in arriv-"ing at the moment when the period commences is that the tug "herself at any rate should be able to show that she was in a "position to receive, and having received, to comply with these "orders in connection with ropes or lines. At the material time I "am satisfied that that period had not arrived; but I think also "that this phrase has to be read as if there were two parties "involved in the matter, and that until the moment has come at "which orders may reasonably be expected to be given from the "ship, the tug cannot be said to be in a position to receive orders "from the ship. Whichever way it is looked at, even if looked "at from the point of view of the tug alone, I am satisfied that "on the facts of this case she was not in a position to receive "orders and that the towing had not begun."

From this Mr. Naisby argued that the President was laying down a general principle that to bring herself within the conditions the tug must prove three things: (1) That the ship was ready to give the order to pick up ropes or lines. (2) That the tug must be ready to receive such orders, and (3) be able and ready to act upon them.

I do not think that the President intended to lay down any general proposition of this kind, but was limiting his observations to the facts of that particular case, and I am fortified in that view

[2] [1936] P. 21, 27.

[3] [1936] P. 21, 29.

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by the observations of the Court of Appeal in *The Glenaffric*.[4] In that case also the meaning of the words "whilst towing" had to be construed, though in the light of facts quite different from those in *The Uranienborg*.[5] In *The Glenaffric*[6] the tug approached the ship three times, being ready to receive lines and to tow the ship. On each occasion the tug was told to keep clear or to wait. Finally, the ship dismissed the tug with a message to the dockmaster, saying that the ship would not dock on that tide. Dropping astern on that order, the tug ran aground and sustained damage. The Court of Appeal refused to read into what Scott L.J. described as the plain meaning of the words of clause 1 any words modifying them. Scott L.J. used the following words[7]: "It is quite clear, on the evidence, as the learned judge "held, that the tug was in that position. The mate was standing "by ready to heave the line and so pick up a rope from the ship, "and I reject Mr. Hodgson's argument because in order to make "it good he has to read into the clause, after the words 'when "'the tug is in a position to receive orders,' the further words "'and the ship is ready to give orders,' which are not there. "Had that been the intention of the parties to the contract or "even those who framed the Standard United Kingdom Condi-"tions, obviously some such words would have been inserted in "the clause. They were omitted, and I think it is clear why they "were omitted. After the tug has arrived at the ship at a proper "time, namely, the normal time in accordance with ordinary "practice, in order to take the ship in tow, she is from then in "attendance on the ship, and necessarily then begins to incur the "risk of damage to herself by contact with the ship. After that, "obviously, as it seems to me, there can be no justification for "implying the suggested words. Such an additional condition, "protecting the shipowner, could easily have been expressed, and "I can see no ground for implication according to the ordinary "rule of construction that nothing can be implied, unless it is "necessary to give efficacy to the business bargain that the two "parties must have intended when they made the contract. Mr. "Hodgson did not actually submit that those words ought to be "implied, but unless they are this argument must fail."

Bucknill L.J. agreed with the judgment of Scott L.J., adding these observations[8]: "The other point I should like to say a word "about is this. I fully appreciate, speaking for myself, the point

[4] [1948] P. 159; [1948] 1 All E.R. 245; 81 Ll.L.Rep. 174.
[5] [1936] P. 21.
[6] [1948] P. 159.
[7] Ibid. 165.
[8] Ibid. 166, 167.

"Mr. Hodgson made that this must be to some extent treated "as a bilateral arrangement, and if the master or the pilot made "it clear to the tug before she got into the position to receive "orders that he was not ready to give orders, then the tug could "not, by putting herself in a position to receive orders, bring "herself within clause 1. But that does not cover the case "where, as Somervell L.J. suggested in argument, a ship leads "the tug to believe that she is ready to give or take a towrope. "I think in this case the facts led the tugmaster to believe that the "ship would be ready to give a rope, and, therefore, that argu-"ment does not apply to the facts of this particular case." Somervell L.J. also agreed, and pointed out that the tug reasonably expected to receive orders in relation to towage from the ship, and that clause 1 therefore applied.

In spite of Mr. Naisby's interesting argument to the contrary, I have come to the conclusion that clause 1 means what it says and that the clause attached when the tug is in a position to receive orders to pick up ropes or lines. This presupposes that the ship is ready to give such orders, if they are required. But I cannot accept Mr. Naisby's submission that a tug can thereafter put herself outside the conditions by getting into a position which may for a short period make it impossible for her to carry out such orders. To import such a condition when the tug is already in attendance on the ship and therefore in danger of incurring damage would, as Scott L.J. pointed out in *The Glenaffric*,[9] be without justification. I find that here the collision occurred whilst towing, and there must be judgment for the defendants accordingly.

Judgment for the defendants.

Solicitors: *Sinclair, Roche & Temperley for Botterell, Roche & Temperley, Newcastle-upon-Tyne; Bentleys, Stokes & Lowless for Bramwell, Clayton & Clyton, Newcastle-upon-Tyne.*

A. S-R.

[9] [1948] P. 159, 165.

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